A critical analysis of the challenges of effective enforcement of international humanitarian law
a study of the fight against Boko Haram in Nigeria

Bukar, Muhammad Ibrahim

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A Critical Analysis of the Challenges of Effective Enforcement of International Humanitarian Law: A study of the fight against Boko Haram in Nigeria.

By

Muhammad Ibrahim Bukar

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Abstract

Nigeria is involved in a non-international armed conflict (NIAC) against Boko Haram, a non-state armed group (NSAG) that has been causing havoc in northern Nigeria since atleast 2009. In the past years, Boko Haram has developed strategically, militarily, and ideologically under the presumed leadership of Abu Shekau. Between 2013 and 2014, the group also expanded territorially - controlling large swathes of territory in Borno, Yobe and Adamawa states, - northeast Nigeria. International Humanitarian Law (IHL) is one of the oldest branches of international law, a complex and diverse area of law, covering matters such as the treatment of civilians in times of hostilities, permissible means and methods of conducting such hostilities, as well as rules vis-à-vis implementation, enforcement and accountability. Sadly, when these IHL rules are violated, or ignored, they often result in brutal and inhumane outcomes, as we have seen in the Boko Haram armed conflict. This study has examined this complex and dynamic part of international law in the context of the Boko Haram armed conflict. This study critically analysed the challenges facing the effective enforcement of international humanitarian law in the fight against Boko Haram in Nigeria. From the empirical data obtained, the study identified three fundamental issues, which largely inhibit the effectiveness of enforcing international humanitarian law in the conflict, including lack of political will on the side of the government; challenges of disciplined and trained security forces; and lastly, the issue of weak (ineffective) institutions i.e. the judiciary. Working from the tripartite challenges, the study argues that the unwillingness of the Nigerian authority in enforcing international humanitarian law (IHL) has led to several breaches of the rules of IHL during the conflict, including targeting of civilians and civilian objects, and acts of torture, rape and other forms of sexual violence. Among other issues,the thesis offers a comprehensive analysis of the causes and responses to sexual violence in the conflict. It explores the conditions that make women and girls most vulnerable to these acts by both parties to the Boko Haram conflict. Difficult questions of effective enforcement and accountability are also tackled; in particular, the political will of the Nigerian government's obligation to investigate and prosecute alleged perpetrators of crimes in the conflict, as well as the core purpose of Common Article 1 to the 1949 Geneva Conventions, and related obligations under the laws of war so that States, concerned about the atrocities that civilians, especially women and girls in the Boko Haram armed conflict are made to endure, may find a common cause in challenging the inhumanity that is contemptuous of human beings, and the untold sorrows it imposes on millions.However,part of the process of ensuring that violations of IHL are addressed, and that people are held accountable for their actions or inactions, is to educate the society about the laws of armed conflicts, and that when violations of the rules are brought to light, some public accounting for such acts takes place. This study is part of that process, and contributes to the process of disseminating the law of armed conflict, and bringing knowledge about its content to society at large.

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Dedication

To my parents

Acknowledgements

My praise and thanks to Almighty Allah for His mercies, and for guiding me to complete this enormous task.

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Map of Nigeria

Nigeria is a federation of 36 states, and a federal capital territory of Abuja, with a population of about 206.1 million people, in 2020, according to the UN population fund. It has about 350 ethnic groups, with about 250 languages. Nearly 50% of the population are Muslims, mostly in the Northern part, 40% are Christians mainly in the Southern part, and about 10% followers of traditional African religions reside in Southern Nigeria. The Northern part is largely influenced by Islamic culture, education and economics while the Southern part is influenced by western culture, education and economics. The sect is based in Maiduguri, Borno state, the centre where it organises and launches its assaults on civilians. Arguably, the group has over 280,000 members across the 19 states of Northern Nigeria. The rate and quantity of killings carried out in the conflict especially by the Boko Haram members could certainly be a mobilizer of public sympathy, with over 150,000 killed since 2009. The escalation of the conflict has witnessed the internal displacement of about 2 million people around the North-Eastern part of the country. The war has led to serious violations of IHL rules committed by the forces involved in the conflict; the Nigerian security forces and the Boko Haram armed group. Boko Haram has abducted thousands of women, girls and boys, many of whom were recruited as child soldiers, forced marriages and sexual oppression. On the other hand, the friendly forces have also allegedly engaged in committing the offence of war crimes such as extra-judicial killings, mass arbitrary arrests and detentions, torture and ill-treatments, leading to the death of thousands while in custody. Other crimes include rape and sexual exploitation of victims especially in the internally displaced camps.

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Abbreviations

- ICC - International Criminal Court
- ICTY - International Criminal Tribunal for the Former Yugoslavia
- ICTR - International Criminal Tribunal for Rwanda
- SCSL - Special Court for Sierra Leone
- IHL - International Humanitarian Law
- AU - African Union
- UN - The United Nations
- ECOWASEconomic Community of West African States
- CJTF - Civilian Joint Task Force
- NEMA - National Emergency Management Agency
- NGO - Non-Governmental Organisation
- N/A - The Nigerian Army
- N/P - The Nigerian Police
- IDP - Internally Displaced Persons
- SEMA - State Emergency Management Agency
- A/P - Additional Protocol
- OTP - The Office of the Prosecutor –OTP
- ECOMOG - Economic Community of West African States Monitoring Group
- C/V - Civilian Victims
- V - Victims
- JTF - Joint Task Force
- UNSC - United Nations Security Council
- UNGA - United Nations General Assembly
- MNJTF - Multinational Joint Task Force
- NSAG - Non-State Armed Group
- ICRC - International Committee of the Red Cross
- NIAC - Non-International Armed Conflict
- MMC - Maiduguri Metropolitan Council
- TPA - Terrorism Prevention Act
- GC – Geneva Conventions

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General Introduction

> 'War breeds atrocities. From the earliest conflicts of recorded history to the global struggles of modern times, inhumanities, lust and pillage have been the inevitable by-products of man's resort to force and arms.'[1]

The regular military officer may possibly prefer to dispute the inclination of the public to see war simply as incidents of mindless slaughter and tremendous damage.[2] The effects of conflict, however, must put beyond rational debate the position that armed conflicts and other kinds of war have demonstrated over time, to be little more than morbid funfairs of varied harms that make the victims out of their own kind. That fact has now been acknowledged even by the heroes of contemporary armed conflicts. General Schwarzkopf of Desert Storm fame, for example, reportedly stated that:

> 'War is a profanity because, let's face it, you've got two opposing parties trying to settle their differences by killing as many of each other as they can.'[3]

Parker also noted that the 'business of the military in war is killing people and breaking things.'[4] Further, McNamara observed that more than 160 million lives were lost in armed conflicts in the last century,[5] excluding the numbers crippled and wounded in body and mind, there is no doubt that a host of what is commonly accepted as immoral conducts are unleashed with little or no remorse by mankind against their fellow beings during hostilities. In his lament of the heinous brutality of war that does not restrict its devastating effects on combatants only, J Glenn Gray (a World War II veteran) stated that:

> "Modern wars are notorious for the destruction of nonparticipants and the razing of properties in lands that are accidentally in the path of combat armies and air forces. In World War II the number of civilians who lost their lives exceeded the number of soldiers killed in combat. … Through folly or fear, nearly every soldier has exposed his own men to needless destruction at one time or another. Add to this the unnumbered acts of injustice so omnipresent in war, which may not result in death but inevitably bring pain and grief, and the impartial observer may wonder how the participants in such deeds could ever smile again and be care free.
>
> The sober fact seems to be that the great majority of veterans, not to mention those who helped to put the weapons and ammunitions in their hands, are able to free themselves of responsibility with ease after the event, and frequently while they are performing it. Many a pilot or artilleryman who

[1]Justice Murphy in Dissent, *Yamashita v. Styer*, (1946) 61 (672) U.S para 62
[2]David Chuter, *War Crimes: Confronting Atrocity in Modern World* (Boulder, Colorado: Lynne Rienner, 2003) 5
[3]Bob Woodward, *The Commanders* (New York: Simon & Schuster, 1991) 313
[4]Geoffrey Parker, 'Dynastic War: 1494-1660' in Geoffrey Parker, *Cambridge Illustrated History of Warfare* (Cambridge University Press, 1995) 161
[5]Robert McNamara el al, *Wilson's Ghost: Reducing the Risk of Conflict, Killing, and Catastrophe in the 21st Century* (New York: Public Affairs, 2001) xvi

> has destroyed untold numbers of terrified noncombatants has never felt any need for repentance or regret. Many a general who has won his laurels at a terrible cost in human life and suffering among friend and foe can endure the review of his career with great inner satisfaction. So are we made, we human creatures."[6]

The various means of this heinous act of life destruction includes actions that are viewed as unlawful and often partially promoted by responsible people in responsible command of their armed forces. Some of these countless heinous acts of injustice that are so prevalent in armed conflict situations are regarded by some martial reactionaries as having strong military grounds.[7] Committed too often are actions generally condemnable as abnormal, utterly unlawful and unnecessary harm – committed by poorly monitored rogue soldiers who were presumably well-trained, armed and mobilized by responsible individuals in responsible command of the relevant armed forces. Criminal acts committed by other persons subscribing to the existing havoc of hostilities, such as the Civilian JTF members in our current study, are another reason that account to the atrocity perpetrated during hostilities.

In view of the above various scenarios of heinous acts perpetrated during armed conflicts, an insurgent group known as Boko Haram has also been causing civil and other disturbances in northeast Nigeria since at least 2009. The group only caught the attention of the international community in 2014 after the abduction of 276 school girls from Chibok, a town in Maiduguri Borno State, northeast Nigeria.[8] This was not the first mass abduction operation conducted by the group, nor the most violent, but it surpassed previous incidents and made international front page news. In July 2009, the Nigerian security forces clamped down on Boko Haram, killing at least 700 people, including the group's founder Mohammed Yusuf. Since then, the conflict has been marked by targeted killings, prevalent cases of abductions, burning and looting, and attacks on schools, teachers and students.[9] Since 2009,

[6]J Glenn Gray, *The Warriors: Reflecting on Men in Battle* (New York: Harcourt, Brace, 1959) 172
[7]Chuter, *Ibid*, 5
[8]HelonHabiba, *The Chibok Girls: The Boko Haram Kidnapping and Islamic Militancy in Nigeria* (Penguin Publishers, 2017)
[9] Emmanuel Onah "Boko Haram Insurgency and the 2015 General Elections in Nigeria" (2015) 11 *Journal of International Studies*,15

an estimated 37, 530 civilians were unlawfully killed in the context of the Boko Haram armed conflict.[10]

However, this research suggests that it is not the success of Boko Haram that most alarmed the international community of the dangers posed by the insurgents. Rather, it is the connections of Boko Haram group with other deadly terrorist organizations. Between 2010 and 2013, the group joined forces with cross-border terrorist groups such as Al Qaeda, Al Qaeda in the Islamic Maghreb (AQIM), and Al Shabaab, giving them global platform and ideological credence.[11] Further in 2015, the group pledged its allegiance with the world's number one enemy – Islamic State/ISIS.[12] The conflict intensified between 2012 and 2014, and in 2015, the Nigerian army was joined by troops from neighboring countries of Chad, Cameroon, and Niger under the umbrella of the African Union Peace and Security Council with the key mandate of "Eliminating the presence and influence of Boko Haram in the region."[13] Therefore, while the kidnapping of the school girls did invited a media storm, in reality, it had little impact in motivating a coordinated response from the international community.

The rate and quantity of killings conducted in the Boko Haram armed conflict would certainly mobilize public sympathy, with the multi-day massacre of over 2,000 civilians in Baga town, Maiduguri in 2015;[14] the alleged killing of over 640 civilians by the Nigerian

[10]Human Rights Watch, "They Didn't Know if I was Alive or Dead: Military Detebtion of Children for suspected Boko Haram involvement in Northeast Nigeria" available at: https://www.hrw.org/report/2019/09/10/they-didnt-know-if-i-was-alive-or-dead/military-detention-children-suspected-boko (Accessed August 2020)
[11]Alexander Thurston, *Boko Haram: The History of an African Jihadist Movement* (Princeton University Press, 2018) 271
[12]*ibid*
[13]African Union Peace and Security Council: 484th Meeting at the Level of Heads of State and Government – PSC/AHG/2(CDLXXXIV), 29 January 2015, available at:https://www.peaceau.org/uploads/psc-484-rpt-boko-haram-29-1-2015.pdf
[14]BBC, "Nigeria's Boko Haram: Baga Destruction 'shown in images" available at:https://www.bbc.co.uk/news/world-africa-30826582 (Accessed August 2020)

military after the Giwa barrack attack in Borno State in 2012;[15] the attack of army base in Borno State – robbing weapons, hardware, and vehicles, leaving over 100 Nigerian soldiers dead, in November 2018;[16] and reports of over 8,000 civilians tortured to death by the Nigerian army since at least 2014.[17] The conflict has destroyed the education system in the northeast, the group targeting schools and teachers perceived as teaching a Western syllabus. It has wrecked over 1,500 schools, killed over 2,295 teachers, and displaced 19,000 teachers across the northeastern region of Borno, Yobe, and Adamawa States.[18] Attacks on hospitals have also increased from 1 in 2017, to 10 in 2018 and 11 in 2019.[19] All twenty two attacks took place in Borno State. In 2019, the group killed 3 UNICEF workers and destroyed the maternity and child health unit of Magumeri general hospital and set ablaze its only ambulance.[20] In February 2018, another 110 school girls were abducted in Dapchi town, in Yobe State.[21]Also in 2018, a joint team of Nigerian armed forces and Civilian JTF members set ablaze a market, which destroyed 5 classrooms in the village of Alizaram, Borno State.[22]

Furthermore, women and girls have largely remained highly vulnerable to rape and other forms of sexual violence, including sexual exploitation, sexual slavery and forced marriage.[23] The armed group has continued to be the chief perpetrator of cases of sexual

[15]Vanguard, "Still no Justice for 640 killed by B-Haram's Maiduguri Giwa barracks attack – Amnesty Int'l" available at:https://www.vanguardngr.com/2020/03/still-no-justice-for-640-killed-by-b-harams-maiduguri-giwa-barracks-attack-amnesty-intl/ (Accessed August 2020)
[16]Nigerian Islamists kills scores of soldiers in Military base attack" available at:https://www.theguardian.com/world/2018/nov/23/nigerian-islamists-kill-scores-of-soldiers-in-military-base-attack (Accessed August 2020)
[17]PBS, "Nigerian Military has committed War Crimes in fight against Boko Haram – says Amnesty Int'l" available at:https://www.pbs.org/wgbh/frontline/article/nigerian-military-has-committed-war-crimes-in-fight-against-boko-haram-says-amnesty-report/ (Accessed August 2020)
[18]Human Rights Watch, "They Didn't Know if I was Alive or Dead: Military Detebtion of Children for suspected Boko Haram involvement in Northeast Nigeria" available at: https://www.hrw.org/report/2019/09/10/they-didnt-know-if-i-was-alive-or-dead/military-detention-children-suspected-boko (Accessed August 2020)
[19]Report of the UN Secretary-General, UN Security Council S/2020/652, Para 51, available at:https://childrenandarmedconflict.un.org/wp-content/uploads/2020/07/report-NIGERIA.pdf (Accessed August 2020)
[20]*Ibid*, Para 51
[21]*Ibid*, Para 12
[22]*Ibid*, Para 49
[23]*Ibid*,Para 42

violence that usually take place in the context of other grave breaches of IHL, such as recruitment and or use of abduction. Almost all the women and girls abducted by Boko Haram were raped, forced into marriage and abused both physically and mentally.[24] As demonstrated in chapter 4, women and girls who suffered sexual violence continued to be victims of stigmatization and rejection by their communities, often feared as suspects of Boko Haram sympathizers. Some of these incidents of sexual violence were also attributed to the Nigerian army along with the Civilian JTF members,[25] especially in the internally displaced camps, Giwa barracks and other military detention facilities. Their situation is further compounded by the lack of comprehensive medical and psychological services, and access to justice and reparation is almost absent due to a weak judicial system and lack of sufficient, as well as competent judicial system in the field of international criminal law. Victims often fail to report their cases and sometimes refuse legal support owing to the fear of reprisals.[26] Overall, as identified in chapter 5, the lack of political willingness to prosecute and hold these alleged perpetrators to account for grave breaches of international humanitarian law by the Nigerian authority further frustrate the effective enforcement of international humanitarian law in the Boko Haram armed conflict in Nigeria.

By December 2019, at least 7.1 million people were in dire need of humanitarian assistance, including 4.2 million children in urgent need of education with over 2 million internally displaced in northeast Nigeria, and more than 240,000 people driven to neighboring countries as refugees.[27] The delivery and distribution of humanitarian support was greatly challenged by lack of access, with over 1.2 million people unreachable as a direct consequence of mounting insecurity in northeast Nigeria.[28] This year, 2020, marks the tenth year since the Boko Haram armed conflict began and the group is still strong and capable of

[24] *Ibid*, Para 43
[25] *Ibid*, Para 46
[26] *Ibid*, Para 44
[27] *Ibid*, Para 15
[28] *Ibid*, Para 56

launching offensive attacks, and in control of substantial part of Nigeria's territory since 2013. Many wonder why it is taking Nigeria so long to at least weaken their strength, and/or effectively prosecute perpetrators of crimes on both sides of the conflict. Is it lack of political will? Is it a lack of security forces expertise or weak judicial institution? Or is it due to lack of responsibility of States in discharging their obligation in international law? These are the questions that this research sought to address, especially in chapters 4 and 5 of this thesis.

Research Aims

To critically analyze the challenges impeding the effective enforcement of international humanitarian law in respect of the Boko Haram armed conflict in Nigeria.

Objectives

I. To examine the challenges posed by lack of discipline of the Nigerian security forces in the enforcement of international humanitarian law in Nigeria.

II. To assess the challenge posed by the lack of strong institutions in the effective enforcement of international humanitarian law in Nigeria.

III. To evaluate the lack of political will as a challenge affecting the effective enforcement of international humanitarian law in Nigeria.

IV. To explore the challenge posed by international law on the effective enforcement of international humanitarian law in Nigeria in light of the above factors.

Approach and Limitations

As explained in chapter 3, there are always challenges and limitations when conducting a research on violent non-State armed groups. Immersion into the group is not possible, and gaining access to the recruits was more challenging than speaking to its victims.Most of the reflections and observations I make on Boko Haram have evolved through experience, monitoring the activities of the conflict as it unfolds from afar and dissecting every word written by the many excellent Nigerian and international analyst. In 2017, I travelled to Nigeria to test some of my assumptions and was pleasantly received.The people (participants) I met in Abuja were open, helpful and welcoming, eager to share their views and experiences.

Most useful for this research, however, was realizing the level of erroneous information and propaganda that was perverting the crisis. Ordinary (or should I say extraordinary) Nigerians who have individually mobilized to help the internally displaced persons and victims expressed their anger at the lack of government response. By 'passing the buck' and pointing the finger at his political opponents, the present administration is failing to effectively addressing the danger posed by Boko Haram, allowing the group to blossom. As explained in chapter 5, the unwillingness of the government is further exacerbated by the manipulation of local media that was complicit in its obliviousness to the problems of the northeast. These have of course obscured previous research efforts on the subject, and I am indebted to each person who took time to speak with me and clarify the situation.

Research Questions

- Is it lack of political will?
- Is it of security forces expertise?
- Or is it due to lack of Strong Institutions (such as the Judiciary and Police)?
- Why has there been failure by States in the effective enforcement of IHL in Nigeria under international law?

These are the questions that this research sought to address, especially in chapters 4 and 5 of this thesis, in light of the challenges for effective enforcement of IHL in Nigeria's fight against Boko Haram since 2009.

Theoretical Framework

This research adopts the weak State theory in order to demonstrate how State structures hinder the effective enforcement of IHL in the country.

Weak States Theory

A commentator on statist(ism) states that a weak state theory explains the situation where a country has superior power of political sovereignty over the rule of law and substantial control over the social and economic affairs of the country.[29] Robert I. Rotberg is widely regarded as the founder of the theory of weak states, failed states and collapsed states. According to Rotberg, weak states are the direct "opposite of strong states,"[30] in that these states that do not have the capacity to deliver on their primary duties of protecting civilian life and property. The basic responsibility of the state is to provide security of life and property to its citizens, so where a state is unable to do so, especially when the citizens are in danger of imminent attack, such a state, according to Rotberg, is weak. However,as explained by other scholars, there are different categories of this weakness.[31] Similar to the position of Plato in the *Republic*,[32] where the prince is to use any available means to provide for the "common goods", Rotberg argues that the state's major responsibility is to provide the "political goods."[33]

Arguably, in recent times, the international humanitarian community has collapsed the borders of responsibility and sovereignty.[34] The new approach to sovereignty is not in the mere expression of political independence, but a state's capacity to take responsible and appropriate measures to protect and safeguard its citizens from the threat of attack. States that are unable to do so may lose their sovereignty because responsible members of the

[29] Sebastian Veg "The Rise of China's Statist Intellectuals: Law, Sovereignty, and Repoliticization" (2019) 82 *The China Journal*, 23

[30]Rotberg, Robert I., *When States Fail: Causes and Consequences*. (Princeton University Press, 2010)

[31]Bilgin Pinar and Adam David Morton," From 'Rogue' to 'Failed' States: The fallacy of short-termism" (2004) 24 (3) *Politics* 169

[32]Adam, James "The Republic of Plato, edited with Critical Notes, Commentary and Appendices." (2011).

[33]Rotberg, Robert I. "Failed states, Collapsed States, Weak States: Causes and Indicators." *State failure and state weakness in a time of terror* (2003): 1

[34] James Johnson "Humanitarian Intervention, the Responsibility to Protect, and Sovereignty: Historical and Moral Reflections" (2015) 23 *Michigan State University International Law Review*, 609

international community have the right, at least, as guaranteed by international humanitarian law.[35]

However, in the case of failed states, the theory is traceable to scholars such as Helmen and Ratner, who argued that states that are in constant chaos and lack stability are likely to become anarchical and that collapse is eminent.[36]The inherent difference between failed and collapsed states is that a failed state is seen as a long term and multifaceted development whereas; weak state is the accretion and worse of the process.[37]Instances which can be used to determine whether a state is failed or collapsed include; loss of legitimacy followed by the collapse of public institutions.[38] Once a state begins to lose the confidence and support of citizens, such a state is failing.[39] In failed states, institutions may fail for two basic reasons: lack of resources, or mismanagement attributed to corruption.

While Nigeria shares a lot in common with failed states, at least, as portrayed above, there is no strong evidence that compelled one to see Nigeria as a failed state. The issue is that laws are not effectively observed, yet the state has managed to maintain relative stability in the midst of resistance.

Consequently, the assessment of these theories helped in guiding the analysis of the challenges for effective enforcement of IHL in Nigeria's fight against Boko Haram. Overall, the researcher has demonstrated how state structure hindered or compounded the issue of ineffective enforcement of IHL in the country.

[35]Ramsbotham Oliver, and Tom Woodhouse, *Humanitarian intervention in contemporary conflict* UK: (Cambridge, 1996)
[36]Helman, Gerard B., and Steven R Ratner "*Collapsing Into Anarchy*"' (1993)
[37]Daniel Lambach "Conceptualising State Collapse: An Institutional Approach" (2015) 36 (7) *Third World Quarterly*, 1299
[38] Charles Sampford "Failed States and the Rule of Law" (2011) 1(1) *Jindal Journal of International Affairs*,119
[39]James A. Piazza "Incubators of Terror: Do Failed and Failing States Promote Transnational Terrorism" (2008) 52(3) *International Studies Quarterly*, 469

Contributions of the Study

Thisresearch is undertaken from the standpoint of international law, by an international law student, mainly addressing fellow international lawyers and others who are interested in what international lawyers think and do from the perspective of other disciplines. To that legal-oriented audience, the role of law is not simply about holding the perpetrators of wrong doings during war to account; it is also the work of that international lawyer, in his field of social sciences, to understand the causes of atrocities such as sexual violence, torture, and extrajudicial killings among others in armed conflicts, so as to restrain them through sounddecisions and innovative steps in the area of international law. Such restraint is greatly and desperately needed, particularly in a developing field of international humanitarian law in which counsel and judges have continued to grapple with issues - such as the extent of command responsibility for sexual violence, among other atrocities, perpetrated by subordinates during armed conflicts as demonstrated in the Boko Haram conflict; how best to define rape in international law so as to provide the right level of protection for women and girls during hostilities; whether rape may or may not rightly be considered as an act of genocide in the Boko Haram armed conflict and the extent of such view; whether or not consent given in a hostile environment is viewed valid; whether the offence of sexual violence perpetrated, especially in internal armed conflict is considered as grave breaches; and whether sufficient response exists in international law against the trademark of evil of sexual violence specifically, forced marriage.

With respect to the field of decision-makers for whom this research is relevant, the focus is not limited to the international lawyer drafting legislation or sitting on the bench as a judge in a given case. The focus is also on the lawyer who appears in a case as a prosecutor. It is hoped that these discussions hinged on the “Critical analysis of the challenges of Effective Enforcement of International Humanitarian Law: A study of the fight against Boko

Haram in Nigeria" might assist them, more so than has hitherto been the case, in making better decisions on how to prosecute relevant cases. For, as the proverb goes that the soundness of a judgment from the bench is directly dependent on the quality of counsel appearing before her. Aside from judges and counsel, it is hoped that this research will also assist law teachers; as well as law students, who will become the legislators, judges and counsel of tomorrow.

Lastly, the value of the discussions in this research lies principally in the practical dimensions of the issues that are studied. The aim is to integrate the theoretical into the practical, by reviewing and analyzing issues identified in relevant cases litigated before international criminal tribunals in order to understand and help address the evil of sexual violence in the Boko Haram armed conflict. The exercise draws mostly on months of practical investigations in Nigeria with victims, and relevant stakeholders and insights gained from many years of studies at Coventry University, as well as paper presentations both within and outside the UK in the field of international humanitarian law.

Synopsis

An encyclopedia could not cover one half of the complexities of Nigeria's history and its people, and this thesis certainly does not begin to tackle this task. Rather, I have tried to focus on some of the issues that are most important to the Boko Haram crisis. *A Critical analysis of the challenges of Effective Enforcement of International Humanitarian Law: A study of the fight against Boko Haram* analyses this chameleon like group from its early days as a local cult to its emergence on the international stage as a credible terrorist organization, and the consequence of Nigeria's response to their threat.

Chapter 1 is a condensed history of Nigeria, laying the foundation for the evolution of Boko Haram and focusing on the socioeconomic and political divides between the north and the south of the country. It highlights the inequalities that emerged as early as the rule of

the British Empire and outlines the religious and ethnic differences that have contributed to the regular clashes between the regions. The chapter delves into the history of military rule and assesses its lasting impact on the political distribution of power in the country. It also introduces the reader to a country that is unfamiliar to many, and helps contextualize the environment in which Boko Haram was able to prosper. It further explores the role of religion in the country with a particular focus on the dynamics of political Islam, including the Maitatsine movement, which challenged the state of Kano in the 1970s and early 1980s, and then examines the government response. The second part of the chapter gives an in-depth overview of the evolution of Boko Haram and its transformation into a major insurgency and terrorist group with international links, and Nigeria's response to the threat.

Chapter 2 outlines the contemporary legal framework of IHL, examining the complexities in types of armed conflicts currently governed by IHL, exploring the legal thinking regarding a contentious area – that of the spillover of contemporary internal armed conflicts to other territories and the appropriate law that applies to such hostilities. The second part of the chapter narrows its focus to reviews of related literature on IHL violations in armed conflicts in order to explore the gap that exists in the Boko Haram armed conflict – and how IHL conducts and provides rights and responsibilities for persons who participate (or do not participate) in armed conflicts. Lastly, the chapter explores the mechanisms that exist for enforcement in order to hold violators accountable for their acts.

Chapter 3 discusses the research methodology of the thesis. This study conducted 67 in-depth interviews for the purposes of the research. The data collection focused on the Nigerian authorities' treatment of people who fled villages and towns under Boko Haram control and settled in IDP camps in Maiduguri. We equally interviewed women and girls who had been detained by the security forces in Giwa barracks while fleeing their homes, or in villages during military operations. Four interviews were conducted with humanitarian

agencies involved in response operations, including Amnesty International, International Rescue Committee, National Human Rights Commission, and National Emergency Management Agency, based in Maiduguri and Abuja. Governmental organizations were also contacted, including the Office of the Attorney General of the Federation, and the Nigerian Armed Forces. In order to protect the security and respect the confidentiality of people interviewed, all testimonies have been de-identified.

Chapter 4focuses on the human rights violations committed against women and girls in internally displaced persons camps, as well as the arbitrary detention and mistreatment of women and girls in military detention facilities. It also examines the violations against women who lived in Boko Haram control areas.

Chapter 5 Examines the political will of Nigeria to investigate and prosecute individuals that violate IHL rules in the course of the Boko Haram armed conflict, both the Nigerian security forces and the Boko Haram armed group have committed serious crimes amounting to war crimes and crimes against humanity. Boko Haram has unlawfully murdered thousands of civilians, kidnapped scores of women and girls, and boys, many of whom have been forcibly recruited as child soldiers or subjected to sexual slavery. On the other hand, the Nigerian security forces have committed extra-judicial killings, arbitrary arrests, and detentions, acts of torture, sexual violence and rape. In 2010, the International Criminal Court opened a preliminary examination in Nigeria for alleged crimes committed in the conflict. The Court examines if any domestic judicial proceedings exist, and if so, whether they are genuine and cover the same persons and the same conduct as alleged in the proceedings before the ICC Court.Thus, this chapter explores the political willingness of the Nigerian authority to ensure accountableness for crimes committed by Boko Haram and Nigerian security forces. It further examines the ways in which States are required to fulfill their obligations under international law of armed conflict. It considers the different ways in which

IHL is observed and enforced, and how individuals – and States – can be held accountable for violations of the law by third States that are not party to a given conflict.

Chapter 6- In the final chapter, I restate the major arguments of the research and provide a summarized explanation of the thematic issues of the research (Indiscipline security forces, lack of Political Will and lack of strong/viable institutions). This part of the research helps readers to understand the main question of the study and its findings, in addition to any recommendations that can assist policy makers and bureaucrats to make informed decisions regarding the enforcement of international humanitarian law in Nigeria. It explains that the successful rise of Boko Haram in Nigeria is largely as a result of failed policies and a growing trend of inequality that disenfranchises entire populations. Not only can the Nigerian authorities make an effort to improve social policies, but they can also learn to respond effectively when faced with the establishment and acts of a violent group such as Boko Haram. While international and regional cooperation are crucial for the effective enforcement of international humanitarian law, in Nigeria particularly but not exclusively, a timely, continuous, and wholesome effort is necessary to improve security worldwide, however, unlikely this is to happen.

Gap in the Literature

The review revealed some of the major gaps in the available literature which needed to be bridged. First, the literature on the subject appears too generalized to tackle the specific area concern with this study. The literature has dealt with, at least at the international level such as the evolving focus of the issues relating to international humanitarian law and the increasing demand on states for enforcement. For example, much literature has explained at general level the changing face of the idea and practice of IHL and human rights in general, and how the international system has continued to reflect this changing dynamic. However, there is still a scarceness of materials on the level of implementation of IHL in the fight against Boko

Haram armed conflict. The generalized approach is not only misleading but has proven to be unclear and unable to provide cogent answers to the challenge(s) of enforcement.

Further, the literature concentrates on some aspects of IHL such as the idea and practice of intervention. As a result of the experience of various conflicts in Africa and the world at large, the theme of military intervention has attracted many analysts. However, there has been less attention to the grey areas of non-military interventions that have encouraged enforcement of IHL. The enforcement of IHL by local courts has attracted inadequate commentary is understandable, knowing well the close nature of most African societies as a result of long years of dictatorship, and military intervention in politics which, unfortunately, Nigeria too has her own problems. The few available literatures in this area captured only serious violations, such as the Rwanda, Sudan, DRC, Central African Republic etc.But have not mentioned the intense nature of the Boko Haram armed conflict in Nigeria. Despite this, little or no attention has been given to the limiting factors such as international law and international politics as challenging issues of enforcement of IHL in Nigeria.

Additionally, the focus of most research in this area has largely been towards gross violations by non-state actors. The idea that state actors have also committed crimes against humanity, sexual violence, rape, mass killings, and rape and so on remains largely un-researched in the literature.Likewise, a critical evaluation of enforcing mechanisms and institutions in respect tothe effective enforcement and implementation of IHL rules in Nigeria is needed as most literature that attempted to tackle the question has remained largely descriptive in nature. As I undertake to research the work, this critical review, will pave way for clearer understanding of the inhibiting factors militating against effective enforcement of IHL in Nigeria's fight against Boko Haram. The insufficient data, as a result of multiple factors, has also limited the horizon and standard of most works that attempted to deal with

this theme. Most of the published works are either narrowly written or lack the required data to drive home the knowledge-base and to provoke debate.

In conclusion, the gap(s) established above have omitted important areas that this research seeks to address. This research attempted to look at the challenges of effectively enforcing IHL rules in Nigeria within the country's system rather than world system. Thus, the need to fill it has become paramount. This method, will allow future researchers to begin examining the issues of enforcing IHL rules during conflicts within domestic legislation together with mechanisms established for protecting the lives of civilians, their human dignity and properties rather than from the world system.

Chapter One

The Nigerian State and the Evolution of Ethno-religious Fundamentalism

1.1 Nigeria: A Diverse Nation

The diversity of Nigeria is both incredible and complex. It hosts about 206 million people, 250 ethnic groups with about 500 different languages. Nearly 50 percent of the populations are Muslims, mostly in the Northern region, 40 percent are Christians from the Southern region, and about 10 percent followers of traditional African religions also reside in the south.[40] Regardless of the huge ethnic differences within the country, the British in the colonial era laid down the foundation upon which present Nigeria was built in 1914.[41] Since then, the country has been divided ethnically, religiously and regionally. The three major ethnic groups are at odd over political domination and power sharing; the Hausa-Fulani in the north, the Yoruba in the southwest and the Igbo in the southeast.[42] Struggle over power and access to governments' treasury by these ethnic groups has worsened the situation, with political candidates capitalizing on existing fears. Boko Haram's grievances are deep-rooted in the economic inequalities, religious bigotry and political anxieties that characterized these two uneven regions.

Similarly, years of exceedingly poor living conditions, vast inequalities between the northern and the southern regions, lack of economic opportunities, corruption and disinterest of the Nigerian government provided good atmosphere for Boko Haram to thrive.[43] Most often, terrorist and radical groups emerge from countries with poor track record for upholding human rights, good governance, and lack of commitment to the wellbeing of their citizens.[44] Mohammed Yusuf and Abu Shekau took advantage of the professed corrupt and weak

[40]Adetoro Rasheed Adenrele and Omiyefa M. Olugbenga "Unity in Diversity in Nigeria's Nationhood: Which Way Forward?" (2013) 2 (8) *International Journal of Scientific Research*, 482
[41]*Ibid*
[42]Robert A. Dawod "Religious Diversity and Religious Tolerance: Lessons from Nigeria" (2016) 60(4) *Journal of Conflict Resolution,*617
[43]Mohammed Nuruddeen Suleiman and Mohammed Aminul Karim "Cycle of Bad Governance and Corruption: The Rise of Boko Haram in Nigeria" (2015) 5(1) *Sage Journals,*1
[44]Daniel Gries, Thomas Meierrieks and Margaret Redlin "Oppressive Governments, US Closeness, and Anti-Terrorism" (2014) *Journal of Peace Research,* 1

government of Nigeria to recruit members to their movements. Even though their philosophy is not wholly anti government, Boko Haram is an ultra-salafist group with a hyper-conservative modification idea that opposes modernism in general.[45]

1.2 Disparity between the North and the South

In spite increasing national revenues and an average GDP growth of 6.671 percent in 2013, and 6.31 percent in 2014,[46] growth in Nigeria has been uneven and focused mostly in the south. In general, the quality of living in the country have declined to scales unseen since Nigeria's independence in 1960, while the poverty index has risen steadily in the last decade. Achebe observed that the inequalities between upper and the lower pay in Nigeria was among the biggest in the world.[47] A 2013 survey by the National Population Commission with the assistance of the U.S Agency for International Development disclosed the disparities between the zones.[48]

Although 61 percent of the population falls under the living wage - the weight is unduly felt bySokoto state, whose poverty rate adds up to 86.4 percent. The inequalities in the north and south are also reflected in the health and education studies: Nigeria has an infant fatality rate estimating 157 deaths for every 1,000 live deliveries. While this figure is already too soaring, in the northeast, the death rate soars to 222 deaths for every 1,000 births but decreases to 89 fatalities in the southwest.[49] The effort for the vaccination of children has also had uneven results, with 25 percent of children under two years vaccinated, but only 10 percent in the northwest and as low as 1 percent in Sokoto.

Educational opportunity is another example of the huge disparities between the regions. Level of literacy in the north hardly makes 26 percent for women, with a low of 10

[45]EdlyneEzeAnugwom*The Boko Haram Insurgency in Nigeria* (Palgrave Macmillan Press, 2019) 67
[46]World Bank Data, 'GDP Growth (annual%) – Nigeria; available at:https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=NG (Accessed June 2020)
[47]Chinua Achebe, *The Trouble with Nigeria* (Enugu Nigeria: Fourth Dimension Publishers) 1983
[48]National Population Commission [Nigeria] and ICF International, Nigeria Demographic and Health Survey 2013, available at:https://dhsprogram.com/publications/publication-fr293-dhs-final-reports.cfm
[49]John Campbell, *Nigeria*, (Lanham, MD: Rowman & Littlefield Publishers, 2013)

percent for those in Sokoto against a national average of 53 percent. In Borno, centre of Boko Haram's uprising; the literacy rate is 15 percent while in Lagos in the south, 92 percent of its population are literates.[50] It is estimated that 7-9 million children nationally are out of school of which almost half a nomadic background and have inadequate access to education. These swings are later reflected in the level of youth unemployment that reached 54 percent among under 35 years in 2014, and again the north shows the highest level of unemployment in the country.[51] The inequalities between the two regions are quantified by the Gini index, which rates Nigeria among the most uneven 35 countries in the world with a coefficient of 48.8 (with 0 being closest equality).[52] The Gini index, which measures the distribution of income within countries, indicates that disparity in Nigeria has risen over the last two decades. In fact, the most disadvantaged half of the citizens gets less than 10 percent of the national revenue.[53]

Disparity in Nigeria is ingrained and multilayered. The following will examine how colonialism contributed to regional inequality. It will explore the role of religion in exacerbating the socio-cultural differences and assess the political tools that both the military and civilian government have established or have failed to establish, which provided the perfect environment for Boko Haram to emerge and prosper.

1.3 The Pre-Colonial Nigeria

The religious-ethnic divide of northern and southern Nigeria has been in existence before the colonial era.[54] The diversity of cultural and religious influences helped in shaping modern Nigeria. Exposure to the varied Abrahamic religions in the north and south also strengthened

[50]Leena Koni Hoffman, *Who Speaks for the North? Politics and Influence in Northern Nigeria* (London: Chatham House Africa Programme, 2014)
[51]TunjiAkande, "Youth Unemployment in Nigeria: A situation analysis," available at:https://www.brookings.edu/blog/africa-in-focus/2014/09/23/youth-unemployment-in-nigeria-a-situation-analysis/ (accessed June 2020)
[52]United Nations Development Programme, "Income Gini Coefficient – Human Development Reports," available at:http://hdr.undp.org/en/content/income-gini-coefficient (Accessed June 2020)
[53]AdegokeYetunde, "Disparity in Income Distribution in Nigeria: A Lorenz Curve and Gini Index Approach," (2013) 3(7) *Universal Journal of Management and Social Sciences*, 16
[54]Ikechukwu Jacob "A Historical Survey of Ethnic Conflict in Nigeria" (2012) 8(4) *Asian Social Science*,13

political unions which led to the rise and fall of empires.[55] From the 11th century, the religion of Islam has spread across northern Nigeria, principally through the tour of scholars and traders from the empires of Sudan and Mali.[56] These transient guests lived in the Northern Province and taught their religion to the major ethnic groups; Kanuri and Hausa-Fulani people. By 15thcentury, Kano city has lodged a great number of Islamic scholars and attracted Arab and Taureg traders, as well as pilgrims that were transiting the city.[57] By the 16th century, Borno had built a number of Islamic schools and by the 17th century, Islam was accepted and established as the main religion of northern Nigeria well before the arrival of Christianity to the region.[58] However, within these periods, Islam overlapped with traditional beliefs and it was not until the 19th century that Islamic law was accepted and enforced through the creation of the Sokoto Caliphate by Usman Dan Fodio.[59] The Caliphate lasted for about 100 years and it was regarded as the largest independent state in Africa.[60]

Dan Fodio was regarded as a "model for religious reformer" whiles his caliphate signifies the "climax of Islamic civilization."[61] His victories encouraged further jihads that led to the establishment of Islamic states in Senegal, Sudan, Mali, Cote d'Ivoire, Chad and Central African Republic.[62] Abu Shekau, the present leader of Boko Haram, has sought for legitimacy by rendering himself as the replacement to Dan Fodio and called for the return of

[55]Jibril Ibrahim "Religion and Political Turbulence in Nigeria" (1991) 29(1) *Journal of Modern African Studies*, 115
[56]Yadudu H. Auwalu "Colonialism and the Transformation of Islamic Law in Northern States of Nigeria" (1992) 32 *Journal of Legal Pluralism and Unofficial Law*,103
[57]Lawal M Yusuf "The Spread and Development of Islamic Civilization in Northern Nigeria: A Case study of Katsina State" (2016) 9(5) *International Journal of Business, Economics and Law,*173
[58]Clyde Ahmad Winters "Koranic Education and Militant Islam in Nigeria" (1987) 33 *International Review of Education,*171
[59]Besim S. Hakim and Zubair Ahmed "Rules for the Built Environment in the 19th Century Northern Nigeria" (2006) 23(1) *Journal of Architectural and Planning Research,* 1
[60]Paul E. Lovejoy and J.S Hogendorn "Revolutionary Mahdism and Resistance to Colonial Rule in the Sokoto Caliphate, 1905-6" (1990) 31(2) *The Journal of African History*, 217
[61]Sule G. Ahmad "Economic Ideas of Shehu Usman Dan Fodio" (2007) 10(1) *Journal of Institute of Muslim Minority Affairs,* 139
[62]AbdelkerimOusman "The Potential of Islamist Terrorism In Sub-Saharan Africa" (2004) 18(1) *International Journal of Politics, Culture and Society*, 65

the Islamic caliphate in Nigeria in an open letter threatening the sultan of Sokoto.[63] Dan Fodio reasoned his jihad on Muslim and traditional kings of Hausa land by calling them traitors who betrayed the Islamic faith,[64] an assertion that echoes Shekau's*takfiri* ideology.[65]

On the other side of the country, the colonial masters (British) met with coastal Nigerians in the 17th century and their encounter was primarily concentrated on slave trade and palm oil.[66] The spread of culture and religion was second to the economic interest of the British- missionaries started gaining grip of southern Nigeria in the mid-18th century.[67] Then in 1861, Britain took advantage of the split up of the Oyo Empire following the Yoruba conflict and annexed Lagos as a Crown Colony of the British Empire, ultimately, extended its range to the Oil Rivers and the Middle Belt.[68] While the Sokoto caliphate weakened by conflict and internal struggle, was defeated in 1903 by the British and embarked on the mission of integrating an ethnically, religiously and politically diverse society of people into a single political entity.[69] Thereby, in 1914, the British amalgamated the two regions that were overwhelmingly different in terms of their history, ethnicity, culture and religion.[70] As a consequence, the British decided to govern the country as distinct entities, aggravating the disunion between the north and the south.

[63]Zacharias p. Pieri and Jacob Zenn "The Boko Haram Paradox: Ethnicity, Religion and Historical Memory in Pursuit of a Caliphate" (2016) 9(1) *Journal of African Security*, 66

[64]Nmah Patrick Enoch and Amanambu E. Ebony "1804 Usman Dan Fodio's Jihad on Inter-Group Relations in the Contemporary Nigerian State" (2017) 9(1) *International Journal of Religion and Human Relations*, 47

[65] Practice of Salaafi Jihadist declaring a Muslim as apostate with severe consequences. See generally, Jacob Zenn and ZachariasPieri "How much Takfir is too much Takfir? The Evolution of Boko Haram's Factionalization" (2017) 11 *Journal for Deradicalization*,281

[66]Ejiogu Carol and IjeomaNjoku "The Aru Igbo Trust Network and Slave-Dealing in Igbo land and the Lower Southeast Niger Basin: Assessing the Impact and Consequences of Initial Abolitionary Efforts by Governments in the Atlantic World in the Period, 1787-1807" (2015) 52(4) *Journal of Asian and African Studies*, 3

[67]*Ibid* at 5

[68]Antony G Hopkins "Property Rights and Empire Building: Britain's Annexation of Lagos, 1861" (1980) 40(4) *Journal of Economic History*, 777

[69]Sule Mohammed "War on the Savannah: The Military Collapse of the Sokoto Caliphate under the Invasion of the British Empire, 1897-1903" (2000) 33(1) *International Journal of African Historical Studies*, 222

[70]Akpan W "Ethnicity Diversity and Conflict in Nigeria: Lessons from the Niger-Delta Crisis" (2008) 8I1) *African Journal on Conflict Resolution*, 161

1.4 The Amalgamation of Nigeria

According to Hodgkin, Nigeria is a state of multiple pasts, not a singular past. It involves the socio-political and economic histories of different ethnic groups and civilizations together with various forms of cultural identities.[71] This implies that Nigeria is home to many ethnic nationalities brought together through the mechanism of colonialism.[72]Notwithstanding, at different periods in history, these various ethnic nationalities have interacted with one another through various medium including commercial, religious, cultural, political and other forms of inter-group relations.[73]In spite of the position of Babawale that the various ethnic nationalities have had significant inter-group relations among themselves even before the period of colonization, it would be difficult to conclude that they (ethnic groups) have "peculiar values and orientations, idiosyncrasies and traditions, which in many instances were diametrical and antagonistic by *modus vivendi* and *modus operandi*."[74] However, these groups maintained their political independence aside their unique social and cultural identities. Put differently, these disparate ethnic nationalities enjoyed profound sovereignty but did not co-existed with one another.[75]

The history of these ethnic nationalities was altered with the beginning of colonialism in the last decades of the 19th century and early 20th century. The most significant aspect of colonialism that is related to the present study has to do with the amalgamation of the hitherto two distinct regions – the Northern Region otherwise known as the Northern Nigeria Protectorate and the Protectorate of Southern Nigeria. It is significant to note that the decision leading to the amalgamation of the two geo-political regions was taken without consultation

[71] Hodgkin, Thomas "Uthman Dan Fodio" Nigeria Magazine (1960) 75-82
[72] Dike Kenneth Onwuka*Trade and Politics in the Niger Delta, 1830-1885: An Introduction to the Economic and Political History of Nigeria* (Oxford: Clarendon Press, 1956)
[73]Babawale Tunde *Culture, Politics and Sustainable Development: Lessons for Nigeria* 4. (Concept Publications, 2007)
[74]Odeyemi Jacob Oluwole "A Political History of Nigeria and the Crisis of Ethnicity in Nation-Building" (2014) 3(1) *International Journal of Developing Societies,* 1
[75]Attah Noah Echa "Nigerian Inter-Group Relations: Emerging Trends and Challenges" (2011) 9(1) *African Identities*, 85

with the native authorities.[76] In fact, the action was meant to enhance effective administration of the Nigerian area considering the lack of British administrative personnel and deficiency of material resource.[77] In other words, the facilitators of the amalgamation mission never took cognizance of the prospect of ethnic bickering among the various ethnic groups.[78]

Historians of Nigerian extraction now referred to the lack of consultation of local authorities prior to the amalgamation as the 'deliberation deficit' which connotes "the absence from a given social formation of a common ethos that frames the debate on issues of general concern."[79]The amalgamation ushered the various nationalities then living within the Nigerian area into a transition to a sort of nation-state, the kind that has existed in Europe since the Treaty of Westphalia.[80]Far away, from Nigeria, and Africa, in Europe many significant global events have taken place including the emergence of sovereign states in an international order in the aftermath of the Westphalian state system, and the Industrial Revolutions which resulted in the rise of modern industrial societies.[81] All these events would later shape the development of African societies.

Lest we forget, the decision to merge the two distinct geo-political regions in 1914 was taken not only as a mechanism for colonial convenience but, essentially part of the national interest of the British Government as defined by Lord Lugard, the architect of the amalgamation himself.[82] This goes to say that the British were not unaware of the eventual

[76]Oluwatobi O. Adeyemi "Amalgamation and the Crisis of Governance: The Nigeria Experience" 8(3) *Journal of Public Administration and Governance*, 2161
[77]*ibid*
[78]*Supra*, note 74 "A political history of Nigeria and the crisis of ethnicity in nation-building""But in a move that distinguished him as the author of ethnicity in Nigeria, Frederick Lugard, the first British Governor-General of the Colony and Protectorate of Nigeria (Dec. 1913 – Nov. 1918) eventually and inconsiderately required the various tribal national groups and the Protectorates to amalgamate in 1914, without an appropriate roundtable agreement…
[79]Obadare, Ebenezer. "The alternative genealogy of civil society and its implications for Africa: Notes for further research." (2004).
[80] Davidson Basil *The Black Man's Burden: Africa and the Curse of the Nation-State* (London: James Currey, 1992)
[81]Bayly Christopher Alan *The Birth of the Modern World, 1780-1914: Global Connections and Comparisons* (Oxford: Blackwell, 2004)
[82]Lugard Lord Frederick JD *The Dual Mandate in British Tropical Africa* (Routledge, 2013)

"clashes of civilizations"[83] of the two distinct regions but it was determined to fulfill its national interest of building an unrivalled empire with prestige, power and the quest for economic exploitation.[84]

The colonial amalgamation was seen as an ambition of Britain to build a formidable empire on which the "sun never sets"[85] or an empire that would always have part of its territory in daylight.[86] It is possible to argue that the desperation to build artificial nations[87] including Nigeria was part of the overall objective of Britain. Likewise, it is also very possible to note that "Britain never needed to compound the future by merging the two geo-colonial entities at the time since each was already bigger than most European states and were already viable as contemporary states."[88] However, considering the nature of the relationship between the colonial authority and the colonized people, Britain had the privilege to be not careful to the future plight of the colonized people. The colony was meant to serve two important functions – on the one hand to promote British international diplomacy as well as support its military power and reach, and on the other hand to aid in its economic condition by serving as a "business facility for the resource declining British home industries in the aftermath of the second Industrial Revolution and the abolition of Trans-Atlantic Slave Trade."[89] Therefore, essentially, the forceful merging of the hitherto differing regions was not done out of the need for the objective building of a strong and constructive polity with the hope to organize the natives for their advancement within the world system. It was essentially undertaken for the very benefit of the colonizers against the colonized.

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[83] Huntington, Samuel "*The Clash of Civilizations?" In Culture and Politics* (Palgrave Macmillan, New York, 2000) 99-118
[84]ChibuikeUche "Oil, British Interest and the Nigerian Civil War" (2008) 49(1) *Journal of African History*, 111
[85] Armitage, David The Ideological Origins of the British Empire (Cambridge University Press, 2000) 32
[86]*ibid*
[87] Are such States whose political borders do not coincide with a division of nationalities desired by the people on the ground
[88]*Supra*, note 74 at 7
[89]*Ibid*

Realizing the crucial nature of the amalgamation and its importance to the advancement of British interests, the first task was to identify a competent official that would fulfill the objective of the mission.[90] This was more so that the British officials had anticipated serious resistance from among the local population.[91]

With such experience and credentials, the ground was cleared for the marriage of inconvenience between the Northern and Southern regions. Immediately after the amalgamation was concluded, the new nation was confronted by the twin evil of ethnicity and religiosity.[92] Many scholars have traced the emergence of ethnicity and religious politics to the period of amalgamation.[93] With amalgamation comes indirect rule policy which utilizes existing political institutions in place for colonial expediency.[94] Since this period, Nigeria has been known as the theater of ethno-religious conflicts and other forms of negative identity politics.[95] Throughout the colonial era, these forms of negative identity politics have continued to fuel mutual suspicion among the two antagonistic regions of the country.[96] As noted by Oni, "ethnicity is the main impediment to the overall politico–economic growth of the country."[97] Since the amalgamation of 1914, the state stakeholders in Nigeria have consistently struggle with one task – the wild goose chase of nation-building. It was based on this note that Chief Obafemi Awolowo once asserted that "…that amalgamation will eternallybethe most painful injury British administration imposed on Southern Nigeria."[98]

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[90] Thornton, Daniel L. "The Dual Mandate: Has the Fed Changed Its Objective?" (2012) 94(2) *Federal Reserve Bank of St. Louis Review*, 117

[91] Afigbo, Adiele E. "Background to Nigerian federalism: Federal features in the colonial state" (1991) 21(4) *The Journal of Federalism*,13

[92] Victor Ifeanyi Ede and Faith OziomaChiaghanam "Ethno-Religious Conflicts and the Restructuring of Nigeria Debate: Issues, Trends and Perspectives" (2018) 6(6) *Asian Journal of Humanities and Social Studies*, 2321

[93] Kastfelt Niels *Religion and Politics in Nigeria: A Study in Middle Belt Christianity* (London: British Academic press, 1994)

[94] Anthony I Nwabughuogu "The Role of Propaganda in the Development of Indirect Rule in Nigeria, 1890-1929" (1981) 14(1) *Boston University African Studies Center*, 65

[95] Basil Ugorji "Ethno-Religious Conflict in Nigeria" (2016) *International Center for Ethno-Religious Mediation*, 3

[96] OsaghaeEghosa"Explaining the Changing Patterns of Ethnic Politics in Nigeria" (2003) 9(3) *Nationalism and Ethnic Politics*, 54

[97] Mwakikagile Godfrey *Ethnic politics in Kenya and Nigeria* (Nova Publishers, 2001)

[98] Onwudiwe, O. 'North and the Rest of Us' This Day, (2011) Vol. 16, No. 5861, Wednesday, May 11, 18

Many scholars are of the opinion that the manner in which the amalgamation was done essentially birthed ethnicity and religious intolerance in the national polity. One such opinion reads: "Lugardist reckless exploitation of ethnicity for colonial expediency was sanctified in the above context, and ever since, Nigeria has become a huge laboratory for political and other forms of social science."[99] In the following, an attempt is made to trace the beginning of bitter contestation among the ethnic groups that have been forced to remain together through the amalgamation of 1914.

1.5 Attempts at Northern Separatism during the Colonial Period

Three decades after the amalgamation of the two regions, ethnic clashes continue to characterise relations among the major ethnic groups.[100] While the minority groups in the country's Middle belt and the Niger/Delta region continue to cry of domination and marginalisation by the major ethnic groups.[101] As noted by political scientists,includingRichard Joseph, these clashes became more pronounced during the quest for political independence where political parties were established on ethnic rather than ideological inclinations.[102] In fact, many have traced the contemporary challenges faced by the state stakeholders in the quest for development to the effect of ethnic politics which have its root in the period under discussion.

While ethnic division and clashes of civilisation was not entirely new to colonial Nigeria, the structure of political parties and their loyalties made it more difficult for resolutions to be reached virtually on all aspect of the national agitations; including the time frame for political independence.[103] In effect, the major reason that started the quest by

[99]*Supra*, note 74 at 8
[100]Felicia H. Ayatse and Akuva I. Isaac "The Origin and Development of Ethnic Politics and its impact on Post-Colonial Governance in Nigeria" (2013) 9(17) *European Scientific Journal*, 178
[101]Eghosa E. Osaghae "Managing Multiple Minority Problems in a Divided Society: The Nigerian Experience" (1998) 36(1) *Journal of Modern African Studies*, 1
[102] Joseph A Richard "Class, State, and Prebendal Politics in Nigeria" (1983) 21(3) *Journal of Commonwealth and Comparative Politics*, 21
[103]Tignor, Robert L. "Political Corruption in Nigeria before Independence" (1993) 31(2) *The Journal of Modern African Studies*,175

Northern politicians to advocate for separation from the rest of the Nigerian state was the differences on how and to when to attain political independence. A famous Nigerian commentator avers that "the Southern Political parties continues to push for more effective power for African ministers and supported in opposition of the Northern stance, for grant of self-government in 1956."[104] It later took a major constitutional settlement for a temporary solution to be reached with the birth of the Lyttleton Constitution which "now made the regions to assume the aspect of states within a federation."[105] Bitter disagreement among party faithful became frequent such that debates were not undertaken without intense emotion and infighting.[106] In one of the recorded debates in 1953, Northern elites in the parliament opposed the motion that was moved for Nigeria's independence in 1956 for political motives and further jeopardised what would seem the national interest of Nigerians.[107] In support of a decision to oppose the granting of self-rule by 1956, Sir Ahmadu Bello argued: "I rise to associate myself with the last speaker. The mistake of 1914 has come to light and I would like to go no further. I was referring to the amalgamation that took place in that year between the old independent governments of Northern and Southern Nigeria."[108]

On this note, Sir Ahmadu Bello elaborated further when he asserted more boldly:

> "We were all not only upset at our handling, but wronged that people who were so full of fine phrases about the unity of Nigeria should have set their people against the chosen representatives of another Region while crossing through their territory and even in our own. What kind of trouble had we let ourselves in for by sticking with such people? "Lord Lugard and his amalgamation were far from popular amongst us at that time. There were concern in favour of separation; we should set up on our

[104]Tamuno N Tekena "Separatist agitations in Nigeria since 1914" (1970) 8(4) *The Journal of Modern African Studies,* 563

[105]Greene, Jack P. *Negotiated Authorities: Essays in Colonial Political and Constitutional History* (Charlottesville University Press of Virginia, 1994)

[106]Imoh-ItahImoh Luke Amadi and Roger Akpan "Colonialism and the post-colonial Nigeria: Complexities and contradictions 1960–2015: A Post-Development Perspective" (2016) 2(3) *International Journal of Political Science,* 9

[107]Martin Lynn "The Nigerian Self-Government Crisis of 1953 and the Colonial Office" (2006) 34(2) *Journal of Imperial and Commonwealth History*,245

[108]EkanolaAdebolaBabatunde "National Integration and the Survival of Nigeria in the 21st Century" (2006) 31(3) *Journal of Social, Political and Economic Studies,* 279

> own; we should discontinue having anything more to do with the Southern people; we should take our own path."[109]

The point above shows the extent of division even among the educated elites not only on matters of principles but, also on issues of ethnicity and sometimes religion. However, Nigeria survived the winds of separation as eloquently captured by Ali Mazrui in the following words: "Nigeria's amalgamation has outlived Northern secessionism after World War II when Northern Nigeria wanted to attain independence as a separate country from the South. Kwame Nkrumah, the Ghanaian leader, described Northern separatist at that time as a form of "Pakistanism" with the goal of religiously inspired separation. Yakubu Gowon was at the time a mere child and a Christian and was not involved in Muslim separation."[110]

In spite of the sharp division on the basis of ethnicity and religion, relative agreement exists among the elites exist on the need to maintain a federal system of government, giving powers to the subordinate regions.[111] On this note, the leader of the Action Group (AG), the dominant political party in the Western Region, emerged as the most vocal advocate of a federally structured Nigeria in which the various regions would exercise substantial powers with a weaker centre. Awolowo documented his view of a Nigeria with a federal structure in a book entitled "The Path to Freedom" in which he noted the following:

> "Nigeria is not a nation. It is a mere geographical expression. There are no "Nigerians" in the same sense as there are English, Welsh, or French. The word "Nigerian" is merely a unique appellation to differentiate those who reside within the boundaries of Niger area from those who do not."[112]

The movement for Northern separation may not have succeeded but the embers of ethnicity and religiosity continue to burn such culminating into Civil War during the first decade of Nigeria's political independence. The following captures the role of ethnicity and religion

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[109] Bello Alhaji Sir Ahmadu My Life (Cambridge 1962)" The teacher concerned was SJ Hogben (see West Africa, 10 Sept. 1971, 1009). Similarly, it is generally accepted that it was JO Udal of the Sudan Political Service who introduced Winchester football to Gordon College, Khartoum: 29

[110] Mazrui A. Ali. "The path to Nigeria's greatness: Between exceptionalism and typicality" https://www.chidoonumah.com/the-path-to-nigerias-greatness-between-exceptionalism-and-typicality/ (Accessed December, 2019)

[111] Olowu, Dele "The literature on Nigerian federalism: A critical appraisal" (1991) 21(4) *Journal of Federalism*, 155

[112] Obafemi Awolowo Path to Nigerian freedom (Faber and Faber, 1947)

leading to the war and how national cohesion remains one of the most significant challenges to national development.

1.5.1 Attempt at Igbo Separation

The history of British state-building during the colonial era up until the end of colonialism in 1960 cannot be complete without the role of colonial military forces.[113] The British colonies relied on the armed forces for conquest of societies that tried to resist colonial conquest.[114]Shortly before political independence, Nigeria's security architecture was made to reflect Nigeria's identity. This process has been described by social scientist as the "Nigerianization"[115] of the armed forces, police and other security outfits. This entails the domestication of the security personnel handling strategic security details in the hands of Nigerians. But the attempt to handover the security architecture to the indigenous people on the eve of political independence could not rectify the deep-seated structural challenges of selective recruitment that have been entrenched by the colonialists. Scholars on Nigerian military including Mazrui, McNall, Scott G, Robin Luckhamobserved that inherited challenge(s) associated with selective recruitment and how that has impacted negatively on the performance of the military and fuelled military coups.[116]Immediately after the Second World War, the composition of the army was altered from a *hausa dominated* structure to that which had "artillery units and infantry battalions."[117]The table below shows a tiny number of indigenous men within the officer corps of the Nigerian army. Even at that, all of the little number was drawn from within the lower Niger region of Nigeria. In other categories, mostly lower ranks, Igbo tradesmen and some other minorities within the Niger/Delta who have gained Western education appear to have an edge over the Northerners.

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[113]Dummar C. Fredrick *The History of the Nigerian Army and the Implications for the Future of Nigeria* (Biblio Scholar, 2012)
[114] Miners Norman *The Nigerian Army, 1956-1966* 1st Ed (Methuen, 1971)
[115]McNall G Scott "Robin Luckham: The Nigerian Military (Book Review)" (1972) 50(4) *Social Forces*, 541
[116]*Ibid*
[117] Kirk-Greene and Anthony H Millard "A preliminary Note on New Sources for Nigerian Military History" (1964) 3(1) *Journal of the Historical Society of Nigeria*, 129

1.5.2 Inventory of Nigerians accredited into the officer cadre in the period 1946-57

Officer	Origin (Geographical and Ethnic)	Year of Commission
Bassey	South (Efik)	1946
Ironsi	" (Igbo)	1949
Ademulegun	" (Yoruba)	1949
Shodeinde	" (Yoruba)	1950
Maimalari	North (Kanuri)	1953
Lawan	" (Kanuri)	1953
Ogundipe	South (Yoruba)	1953
Adebayo	" (Yoruba)	1953
K. Muhammed	" (Kanuri)	1954
Largema	" (Kanuri)	1954
Nwawo	South (Igbo)	1954
Fajuyi	South (Yoruba)	1954
Imo	South (Igbo)	1955
Pam	North (Birom)	1955
Kurobo	South (Ijaw)	1955
Effiong	South (Efik)	1956
Njoku	South (Igbo)	1956
Onuaguluchi	South (Igbo)	1956
Ojukwu	South (Igbo)	1957
Ejoor	South (Igbo)	1956
Banjo	" (Yoruba)	1956
Unegbe	" (Igbo)	1956
Gowon	North (Angi)	1956
Okwechima	South (Igbo)	1956
Madiebo	" (Igbo)	1956
Ekanem	" (Efik)	1957
Nzefili	" (Igbo)	1957
Ogbonnia	" (Igbo)	1957

Sources: Robin Luckham, *The Nigerian Military: A Sociological Analysis of Authority and Revolt, 1960-67*, Cambridge: At the University Press, 1971:343-4) and N. J. Miners, *The Nigerian Army, 1956-1966* (London: Methuen, 1971:38-9).

As noted by one scholar, the colonial legacy of divide and rule continue to challenge the stability needed for the smooth operation of the armed forces after independence: "The irony is that, while the divisions that resulted from the flawed structure of the armed forces continued to serve Britain's imperial cause well, even up until the last days of colonialism, it assisted to unclock Nigeria for political unsteadinessupon independence. The followingcase rightly corroborates the assertion about the benefits of the flawed composition of the armed forces to the imperial cause."[118]

Ejiogu went further to observe that "military coups d'état in Nigeria can be traced back to colonial and post-colonial recruitment patterns for military human resources."[119]Again, Mazrui echoed similar opinion when he noted: "At independence amalgamation had given Nigeria an ethnically mixed single national army. But poor national integration had made ethnic consciousness a slight too strong within the armed forces. Amalgamation had made the Nigeria army strong enough to control both halves of the

[118]AdemoyegaAdewale. "*Why we struck: The story of the first Nigerian Coup*" (Evan Brothers publishers, 1981)
[119]"Colonial Army Recruitment patterns and Post-Colonial Military Coups D'etat in Africa: The case of Nigeria, 1966-1993" (2007) 35(1) *South African Journal of Military Studies*, 99

country, North and South. But ethnic divisions within the armed forces turned Nigeria's first military coup in January 1966 into an ethnic massacre. The counter-coup which followed a few months later deepened the ethnic and provincial divide. The country remained amalgamated, but not satisfactorily integrated."[120]

The colonial legacy skewed the recruitment process of the armed forces towards certain ethnic groups depending on their loyalty to the British Crown. Elites led by the Northern politicians whose cultures and traditions were preserved as part of the preconditions for indirect rule,[121] increased their numbers by lowering the entry qualifications into the army as noted: "When northern politicians held state power in 1960, they enacted legislations that increased the number of northerners in the corps. As an example, they lessen the entry requirements, and significantlyreducedfailure rates in the selection assessment into the Nigerian Military Training College with the aim of attracting more northern recruits. One outcome of such preferential policies over the years in the army is that northern beneficiaries of those patron-client incentives regarded themselves as cohorts. Events indicated that their allegiance was primarily angled in favour of their civilian patrons and senior northern colleagues."[122]

While many studies have been written on the causes of the war and its effect on national development, the focus of the present study is to provide some details about how the national cohesion and ethnic politics played out during and after the war. This would help the reader to understand the foundation of ethno-religious conflicts and the rise of sectarian groups such as the Boko Haram in Nigeria's North-Eastern region.

To start with, one fundamental reason that instigated the Igbo secession in the 1960s was the rejection of the Unification Decree which was instituted by the AguiyiIronsi's short-

[120]*Supra*, note 110
[121]NadjouiaHallouch "British-Indirect Rule and Islam in Northern Nigeria-1900-1940" (2018) 4(2) *International Journal of Social Science*, 249
[122]Robin Luckham*The Nigerian Military: A Sociological Analysis of Authority and Revolt, 1960-67* (Cambridge: At the University Press 1971) 244

lived regime in May 1966.[123] Remember that almost all the leaders of the political parties in Nigeria were in favour of a federally structured form of government that allows significant powers in the hands of the regional governments.[124] As a result of the unification decree, "disturbances erupted all over the North, during which several hundreds of people, mostly Igbos (Ironsi's tribe) were killed."[125] While the protests was ongoing on the streets of Northern Nigeria, the Northern military elites in conjunction with its bureaucrats within the civil service were plotting a counter coup to revenge the January 1966 coup that brought AguiyiIronsi to power.[126] Eventually, Ironsi's regime was brought to an end via a counter coup by Northern military officers on 29 July, 1966 with Yakubu Gowon (a Christian minority from Plateau State) as the Head of State. But the Northern elements within the army had wanted to secede away from the Nigerian state as contended by one scholar that: "The original intention of the July 29, 1966 counter coup leaders was to seize the reign of government and then announce the secession of the Northern Region from the rest of the country. This was in line with the general mood of the people of the North, whose clarion call during the May 29 disturbance in the North which claimed many Igbo lives was Araba or Aware (Hausa word for "secede"). In fact, the coup leaders instructed Northern elements in Lagos to leave the metropolis for the North giving a deadline within which to comply."[127]

It was this kind of ethnic politics that laid the foundation for military intervention leading to the quest for Igbo separation. One major consequence of a politicised armed forces were that professionalism was undermined and new crops of military elites became engrossed

[123]Anthony, Douglas. "Irreconcilable Narratives: Biafra, Nigeria and Arguments About Genocide, 1966–1970: Postcolonial Conflict and the Question of Genocide" (2014) 16(2) *Journal of Genocide Research*, 205
[124]Keay E A "Legal and Constitutional Changes in Nigeria under the Military Government" (1966) 10(2) Journal *of African Affairs*, 92
[125]*Supra*, note 123 at 225
[126]NowaOmoigui "Northern Nigerian Rebellion July, 1966" Available at: http://www.waado.org/NigerDelta/Nigeria_Facts/MilitaryRule/Omoigui/NorthCounterCoup.htm (Accessed December, 2019)
[127]MsheliaAyuba*Araba Let's Separate: The Story of the Nigerian Civil War*. (Author House, 2012)

in dirty politics that required them to protect their ethnic interest over national interest.[128] The lack of professionalism became eminent during the Civil War when the Nigerian armed forces under General Gowon engaged in war crimes to punish the Biafran forces leading to the latter's defeat. However, some observers such as Mazrui argued that Gowon as an individual who remained committed to the rules of engagement throughout the duration of the war:"ButYakubu Gowon was constantly aware that saving the territorial integrity of Nigeria was useless without simultaneously pursuing the national integration of its people. He was emphatic about a "code of conduct" and sensitive rules of engagement. He insisted that the so-called Biafrans should not be called "enemies," but should be regarded as fellow Nigerians who needed to be won back into the national fold. He was a compassionate war leader who was against the so-called 'quick kill'. He could have made the illegal night-flying to Biafra dangerous for the aircraft. But for almost a year and a half he shut a blind eye to these night-flights of relief supplies to Biafra."[129]

Irrespective of the personal qualities of the war-time head of state, the Federal government had taken certain steps which can be categorise as war crimes including killings of children, women and armless civilians.[130] In fact, the federal government had deliberately starved the Igbo people of basic food resulting in malnutrition, hunger and deaths.[131] One major incident of war crime was the massacre of civilian population on the 5th of October 1967 when the Nigerian Army entered Asaba, a major town in the Mid-Western region and killed.[132]

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[128] Augustine Kposowa and Craig Jenkins "The Structural Sources of Military Coups in Postcolonial Africa, 1957-1984" (1993) 99(1) *American Journal of Sociology*, 126

[129]*Supra*, note 110

[130]OdigweANwaokocha "Remembering the Massacre of Civilians in Aniomaland during the Nigerian Civil War" (2019)4(7) *Brazilian Journal of African Studies*, 189

[131]Bird S Elizabeth and Frazer M Ottanelli*TheAsaba Massacre: Trauma, Memory, and the Nigerian Civil War* (Cambridge University Press, 2017)

[132]Akpan U Ntieyong*The Struggle for Secession, 1966-1970: A Personal Account of the Nigerian Civil War* (Routledge, 2014) - "The bodies of some victims were retrieved by family members and buried at home while most were buried in mass graves. Many extended families lost dozens of men and boys. Federal troops occupied Asaba for many months, during which time most of the town was destroyed, many women and girls were raped

It would be hard to argue that the federal troops did not involve in war crimes considering the huge number of those killed during the war – over one million lives lost, within two and half years.[133] No doubt, many constructive steps were taken after the war with the hope to ensure greater integration; it would appear that the different regions, religions and peoples are meant to live separately. This is because of the numerous conflicts that continue to characterise their relations, especially from the later part of the 1980s when the structural adjustment programme was launched.[134] The following section looks at the foundation of ethno-religious conflicts and state responses from the 1980s to the present.

1.6 Ethno-Religious Conflicts in Nigeria

Any in-depth study of Nigeria must first and foremost focus on the important and sensitive elements including; ethnicity and inter-group relations, religion and politics.[135] This is because, these forces have often than not determined the pace of Nigeria's development and in many respects challenges its growth and development.[136] In other words, ethnicity, religion and politics have proven to be the fundamental challenge inhibiting efforts toward nation-building and national integration - essential factors that determine growth and development. Following the country's independence in 1960, Muslims and Christians have been at odds to define the roles of their respective religion in politics and governance.[137] Likewise, unprincipled politicians have continued to exploit this vulnerability to gain power over their opponents, using provocative talking points resulting to violence in the diverse

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or forcibly "married," and large numbers of citizens fled, often not returning until the war ended in 1970. The total death toll during early October was in excess of 1,000, although the exact numbers will likely never be known

[133]Nafziger E Wayne "The Economic Impact of the Nigerian Civil War" (1972) 10(2) *Journal of Modern African Studies,* 223

[134]Egwu Samuel "Ethno-Religious Conflicts and National Security in Nigeria: Illustrations from the "Middle Belt" " In State, Economy, and Society in Post-Military Nigeria, pp. 49-83. (Palgrave Macmillan, New York, 2011)

[135]AlemikaEtannibi EO and Festus Okoye "*Ethno-Religious Conflicts and Democracy in Nigeria: Challenges*" (Human Rights Monitor, 2002)

[136]AzeezOlaniyan and Shola Omotola "Ethnic Crises and National Security in Nigeria" (2015) 31(4) *Journal of Defense and Security Analysis,* 303

[137]Simeon O Ilesanmi "Recent Theories of Religion and Politics in Nigeria" (1995) 37(2) Journal *of Church and State,* 309

communities.[138] As a result, religion and ethnicity have become a convenient means for organising and voicing discontent by politicians to gain power.[139] This artificial rivalry created between religious-ethnic communities for power has become part of Nigeria's politics thereby, entrenching the problem for the future.

Sociologically, a state's development can be influenced by the degree of its legitimacy, hegemony and stability.[140] This implies that if a state's domestic structure is illegitimate and unstable, there is the likelihood of chaos arising from conflict of interest among its constituents. On the other hand, if the state is built on the foundation of fair play and all stakeholders are consulted and giving due regard, it is expected that such a state will experience less of domestic contradictions such as conflicts and intra-state wars. The case of Nigeria, according to one commentator, exudes the former as noted that: "The Nigerian situation is such that boycotted the due course of legitimization at formation and this posits serious consequences for its stability. The posture is however compounded by the current religious-political climate in the country, where ethno-religious crises are rampant. The idea of Nigeria as a simpleregionalphrase was engendered by the forceful enclosing by the colonial dictatorial order of reluctant settlements of various backgrounds and culture under the same country. As a result, relations and political behaviour of the people are characterized by mutual suspicion and undesirable relation since they are strange fellows, who were coerced into the nation-state throughamalgamation."[141]

That being said, the following sub-section would consider some of the violent conflicts that have raged Northern Nigeria with religious undertone.

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[138]Isaac Terwase Sampson "Religion and the Nigerian State: Situating the de facto and de jure Frontiers of State-Religion and its Implications for National Security" (2014) 3(2) *Journal of Law and Religion*, 311

[139]OluwaseunOlawaleAfolabi "The Role of Religion in Nigerian Politics and its Sustainability for Political Development" (2015) 3(2) *Journal of Social Science*, 42

[140]Aka O Ebenezer "Regional inequalities in the process of Nigeria's development: socio-political and administrative perspective" (1995) 10(2) *Journal of Social Development in Africa*, 61

[141]Fadakinte M. M "The Nature and Character of the Nigerian State, Explaining Election Crisis in a Peripheral State." (2013) 12(11) *British Journal of Arts and Social Sciences*, 275

1.6.1 The Maitatsine Uprisings

The early 1980s witnessed the growth of religious extremism under the umbrella of a movement known as the Maitatsine,[142] beginning in Kano, a major commercial city in Northern Nigeria. Muhammadu Marwa (Cameroonian citizen resident in Kano city), sparked a riot with his brand of extremist Islamic teaching centered on Islamic purification.[143] A result of the dramatic tune he adopted in advancing his gospel, many young followers were attracted to him and the movement quickly spread to other Northern states including Kaduna (1982), Yola (1984), and Bauchi (1985).[144]The word Maitatsinestands for "the cursed."[145] The man is a famous critic of the Nigerian state system and title of the movement is said to be derived from his constant attack of the political leaders whom he regarded as unclean in the face of God.[146] Aside many other abstract qualities, he pronounced himself a prophet of God who objected to all forms of Western technology.[147] Many researchers have drawn parallels between Maitatsine and the rise of Boko Haram that appears to match in terms of strength, organization and reach.[148] Equally, the groups embraced obsessive values that are different from those held by majority of Muslims in the country.[149] They deliberately engaged violence to confront the country and impose their version of interpretation of Islam.[150]Falola notes the Maitatsine uprising as "a result of Islamic extremism on the one hand, political decadency

[142]Isichei, Elizabeth "The Maitatsine Risings in Nigeria 1980-85: A Revolt of the Disinherited" (1987) *Journal of Religion in Africa*, 194
[143]Danjibo Nathaniel Dominic "Islamic Fundamentalism and Sectarian Violence: The 'Maitatsine'and 'Boko Haram'Crises in Northern Nigeria" (2009) 2 *Peace and Conflict Studies Paper Series*, 1
[144]Hiskett Mervyn "The Maitatsine Riots in Kano, 1980: An Assessment" (1987) 17(3) *Journal of Religion in Africa*, 209
[145]Aghedo, Iro "Old Wine in a New Bottle: Ideological and Operational Linkages Between Maitatsine and Boko Haram Revolts in Nigeria" (2014) 7(4) *African Security*, 229
[146]FalolaToyin*Violence in Nigeria: The Crisis of Religious Politics and Secular Ideologies* (University Rochester Press, 1998)
[147]*ibid*
[148]Abimbola O Adesoji "Between Maitatsine and Boko Haram: Islamic Fundamentalism and the Response of the Nigerian State" (2011) 57(4) *Indiana University Press*, 98
[149]*ibid*
[150]Elizabeth Isichei "The Maitatsine Risings in Nigeria 1980-85: A Revolt of the Disinherited" (1987) 17(3) *Journal of Religion in Africa*, 194

and economic difficulties of the 1970s on the other.[151] The uprising occurred by chance, with the oil boom in Nigeria which sparked social revolution that displaced several local merchants. However, the economic prosperity was characterized by high rate of unemployment, raging corruption and general restlessness in the country. Most of his followers were poor and unemployed that were ruined by the economic decline. Marwa supported them with assistance he received from the wealthy followers and members of the community. The unprecedented number of his followers within a short period is testimony both to Marwa's personality and to the bleak economic condition at the time. He purportedly in 1975 had over 2,000 followers, by 1980 the number tripled in Kano alone and more nationwide.[152]

Explaining the economic factor that drives the emergence of the Maitatsine riot: "the anger in terms of economic dilemma and income disparities, but with links to Islam; he sees the Yan Tatsine, the followers of Marwa, as belonging to the traditional Hausa class known in Kano as gardawa. These were purportedly the students or followers of the mallams, who coach, lecture, and manage to continue the traditional northern Nigerian societal expression of Islam, characterized by the availability of koranic teachers, whose teaching and followership are anticipated to reinforce and advance the reach of Islam and maintain its hold on society. These gardawa, according to him, were mostly temporary migrants from the rural areas to the cities and urban areas, where they pursued part-timebasic Qur'anic schools under the guidance of their chosen teachers, but at the same time were available as seasonal labor in such traditional urban occupations as dyeing, cap making, embroidering, market portering, and mud building and repairing. While these migrations relieved the strain on village grain supplies, these mallams—"knowledgeable middlemen, who understood the interplay of

[151] *Supra*, note 146
[152] Jeremy Keenan *The Dark Sahara: America's War on Terror in Africa* (Pluto Press, 2009)

supply and demand for labor in the big cities— made use of the migrants in addition to teaching them."[153]

While not objecting to the economic-distress explanation of Lubeck, another school of thought noted that the "Yan Tatsine was not really made up of the gardawa, but rather yan-ci-rani, economic opportunists who seek the golden pavements of the big cities for what they can glean from them."[154] Whatever the true perspective would be, the fact remains that the group exudes elements of extremism akin to the *Boko Haram*. Predictably, Aghedoreferred to the Boko Haram as the reincarnation of the Maitatsine movement; "an oil wine in new bottle."[155] Again, the success of Marwa's movement was due to political rivalries and police incompetence which allowed him to expand his sect without any effective government control. Security forces explicitly admitted their fright of the group who were alleged to have "magical powers to resist bullets."[156] His followers were alleged to have outnumbered the police in Kano state with better morale and arguably better trained and armed. Confronted by the Nigerian police on December 8, 1980, in the Shahuci play ground in Kano; where they often went to lecture the public, theMaitatsine overwhelmed the strong police force and burned down about 13 police vehicles in the clash.[157]

Considering the high level of injustice in Nigeria, especially during the era of military rule, the movement had many followers who felt disenchanted with the system. After all, almost all extremist groups exploit the failure of the state system to perpetuate their message of hope through "violent and radical transformation of the society."[158]However, the fundamental question which forms the locus of the present study has to do with the response

[153]*Supra*, note 148
[154]*Supra*, note 144
[155]*Supra*, note 145
[156]Isaac Olawale Albert "Violence in Metropolitan Kano: A Historical Perspective" (1994) F*rench Institute for Research in Africa, Nigeria,* 111
[157]Allan Chirstelow "The Yan Tatsine Disturbances in Kano-A Search for Perspective" (1985) 75(2) *Wiley Connections*, 69
[158]SchilsNele and Antoinette Verhage "Understanding How and why Young People Enter Radical or Violent Extremist Groups" (2017) 11 *International Journal of Conflict and Violence*, 473

of the state and the challenges of enforcing international humanitarian law. From the experience in the 1980s, it is becoming increasingly clear that the fragile nature of the Nigerian state has often provide the fundamentalist groups (not excluding the Maitatsine group) a fertile group to thrive. This understanding is derived from the Weberian conception of the state being the sole guarantor of lives and property; "monopoly of the use of legitimate force in its territory and as such ensure law and order as well as prevent both internal and external threats of violence against its inhabitants."[159] Again, what is similar between the Maitatsine riots of the 1980s and the Boko Haram movement? The following sub-section attempts to elaborate on this and how the Nigerian state, has so far, responded to the threat posed by the Boko Haram armed group.

1.7 The Evolution of Boko Haram and State Response

According to historians including Salleh and Shehu, the Islamic sect commonly referred to as Boko Haram may have been birthed around the early years of the 21st century.[160] In reality, the group's original name is *Jama'atAhl us-Sunnah li'd-Da'wahwa'l-Jihad*Arabic for "the Group of People of distinct method for Preaching and Struggle."[161] However, those who observed the nature of operations, and to a large extend, their antecedents, termed them as "Boko Haram."[162] Literally, "Boko" is a Hausa word for Western education or civilization while "Haram" is an Arabic word for sin or a forbidden act.[163] These two combine to mean "Western education is forbidden."[164] While no specific date has been given for the birth of

[159]Lynn Laurence "What is a Neo-Weberian State? Reflections on a Concept and its Implications" (2008) 1(2) *Journal of Public Administration and Policy*,17

[160]Shuaibu, SalisuSalisu, and MohdAfandiSalleh "Historical Evolution of Boko Haram in Nigeria: Causes and Solutions" (2015) 6(7) *International Conference on Empowering Islamic Civilization in the 21st Century*, 217

[161]Iyekekpolo Wisdom Oghosa "Boko Haram: Understanding the Context" (2016) 37(12) *Third World Quarterly*, 2211

[162]Ezeani Emmanuel Onyebuchi and Chika Francis Chigozie "Islamic Fundamentalism and the Problem of Insecurity in Nigeria: The Boko Haram Phenomenon" (2013) 15(3) *Journal of Humanities and Social Science*, 43

[163]Brinkel Theo and Soumia Ait-Hida "Boko Haram and Jihad in Nigeria" (2012) 140(2) *South African Journal of Military Studies*,1

[164]Murtada, Ahmad. "Boko Haram Movement in Nigeria: Beginning, Principles and Activities in Nigeria. 2013" Available at:

the group, many scholars have traced its origin to the emergence of Mohammed Yusuf as the leader of the group in the year 2002.[165] However, for the purpose of this study, the evolutionary history of the group can be divided into two different phases namely, the first and second phases. In the following, these two phases are explained taking into cognizance the main factors differentiating them.

1.7.1 The First Phase of the Evolution of Boko Haram

As noted in the introduction to the evolution of the group above, Boko Haram has been traced to the early 2000s when Mohammed Yusuf, its pioneer leader began a series of radical teachings leading to his expulsion in two major Mosques in Maiduguri.[166] Mohammed's teachings were nothing short of radicalism and his followers appear to be indoctrinated into believing his approach to Islamic evangelism. Like the Maitatsine movement of the 1980s, the group offers the harshest critic against the Nigerian state and its corrupt elites.[167] This radical teaching of Yusuf was said to have increased following his expulsion. As a result of his expulsion, he built a place of worship called the *Markaz*where his followers received instructions as well as perform religious duties including worship.[168]The Markaz was large enough to accommodate many poor Muslim followers who were groomed in purely radical Islamic views.

Other scholars gave a more detail history of the group. First, Solomon observed that unlike what is known about the group's recent history, it actually began at least a decade

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https://www.academia.edu/19658730/Boko_Haram_in_Nigeria_its_beginnings_principles_and_activities_in_Nigeria (Accessed January,2020)

[165]Rogers, Paul "Nigeria: The generic context of the Boko Haram violence" (2012) *Monthly Global Security Briefing*, 1 at 5

[166]Thurston, Alex "Nigeria's Mainstream Salafis between Boko Haram and the State" (2015) 6(1) Islamic Africa, 109

[167] Duke OnuOffiong, Dickson David Agbaji, and OkonBassey "Corruption and the Challenge of Boko Haram Terrorism in Nigeria: A case of the Nigerian Armed Forces" (2017) *Asian Research Journal of Arts and Social Sciences*, 1

[168]Dr Mustapha Bintube "Boko Haram Phenomenon: Genesis and Development in North Eastern Region Nigeria" (2015) 1(1) *International Journal of Sociology and Anthropology Research*,1

before the year 2002.[169]According to this school of thought, the sect may have started its activities under a title "Shabaab Muslim Youth Organization" then led by MallamLawal who later left for further studies in Madina.[170] However, it was only during the leadership of Yusuf that the group became popular, with large followers who were thirsty for radical teaching. From 2002 up till 2009, the sect recorded only one militant confrontation in 2003 at a place known as Kanamma where lives were lost.[171]

With increasing radical teachings and indoctrination of the group's followers, it would soon lose its peaceful identity.[172] Confrontation with the government security agencies, particularly the Nigerian Police started in 2009 when it tried to enforce a Borno State law prohibiting the riding of motorcycles without helmet.[173]After the incident, Yusuf wrote and demanded the government meet certain conditions including a settlement plan with the government within a speculated period of forty days without which the group would launch a jihad.[174] The government did not meet nor take the group's threat seriously and this would mark the beginning of a series of confrontations between the security forces and the group.[175] This would mark the end of the first phase of the evolution of Boko Haram and usher in beginning of the second phase of evolution of the sect.

1.7.2 The Second Phase of the Evolution of Boko Haram

The year 2009 marked the evolution of the second phase of Boko Haram. Unlike the first phase, this phase witnessed bloodletting as a result of clashes between the Nigerian security forces and the sect. This started when the Nigerian security forces allegedly launched an offensive against the group's leader leading to the killing of many of his followers and ending

[169]Hussein Solomon "Nigeria's Boko Haram: Contesting Ethnic, Religious and Regional Identities" (2015) *Terrorism and Counter Terrorism in Africa*, 85
[170] Cook David "The Rise of Boko Haram in Nigeria" (2011) 4(9)*Combating Terrorism Centre*, 3
[171]*ibid*
[172]Agbiboa E Daniel "Peace at Daggers Drawn?: Boko Haram and the State of Emergency in Nigeria" (2014) 37(1) *Studies in Conflict and Terrorism*, 41
[173]Comolli Virginia Boko Haram: Nigeria's Islamist Insurgency (London: Hurst and Company, 2015)
[174]*Supra*, note 164
[175]Walker Andrew What *is Boko Haram*? Vol. 17 (Washington, DC: US Institute of Peace, 2012)

his life. This offensive which took place on 28 July 2009 recorded over 1000 deaths with Maiduguri loosing over 700 lives in one day. This unprofessional offensive played into the tactics of the group who over time criticized the Nigerian state and its security forces of corruption and oppression.[176]

Since then, the group has maintained a hard stand against the Nigerian state; preaching jihad and soliciting assistance from other terrorists' groups. After the killing of Mohammed Yusuf, a more radical leader emerged – AbubakarShekau. Shekau devised new tactics to gain popularity including attacks on soft targets and abduction of vulnerable populations. What remains a mystery to the world is the circumstance leading to Yusuf's dead while in police custody. It is this tendency to abuse international humanitarian law that this study intends to investigate. But before we investigate the various abuses of human rights and violations of IHL rules in the conflict, we would first review how Boko Haram has evolved under its new leader AbubakarShekau and the different dynamics the conflict took over the years.

1.7.3 Leadership of Abu Shekau and his Command Structure

After the death of Mohammed Yusuf in 2009, the group retreated for about a year, meanwhile appointed Abu Shekau, Yusuf's deputy as its new leader and revised its approach to achieve its objectives.[177]Shekau supposedly married one of Yusuf's wives and also took custody of his children.[178] Both Yusuf and Shekau belong to the same ethnic clan-Kanuri; lineage of the once Kanem-Bornu Empire that spread throughout northern Nigeria, Chad, Niger and Cameroon. Together with Hausa-Fulani and other external components, they combine to form the group's troops.[179]

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[176]Obamwonyi, Samson E. and Robinson O. Owenvbiugie "Boko Haram Insurgency in Nigeria: A Nation-State in Search of Cohesion for National Development" (2015) 4(1) *International Journal of Arts and Humanities*, 31

[177]ElodieApard "The Words Boko Haram: Understanding the Speeches by Mohammed Yusuf and Abu Shekau" (2015) 3 (255) *Journal of AfriqueContemporaine*, 41

[178]BBC "Nigeria's Boko Haram leader AbubakarShekau in profile" Available at: https://www.bbc.com/news/world-africa-18020349. (Accessed March 2020)

[179]Zacharias Piers and Jacob Zenn "Under the Black Flag in Borno: Experiences of foot soldiers and Civilians in Boko Haram's caliphate" (2018) 56(4) *The Journal of Modern African Studies*, 645

Under his leadership, Shekau made a fairly advanced media campaign, distributing videos and leaflets proclaiming war against the secular enemies of the group.[180] Such enemies are religious leaders, security forces, churches and mosques, schools, market places, banks, politicians; became Boko Haram's primary targets over the next 9 years.[181] Through the years, Boko Haram has adopted strategies such as suicide bombings, improvised explosive devices, drive-by shooting and targeted killings across northern Nigeria.[182] For example, Shekau released a video clip in 2010 commanding his followers to launch attacks on all the security forces and other traitors.[183] After this proclamation, Nigeria witnessed high increase in drive-by shootings attacking police stations and the armed forces in Borno and Yobe states, with the attacker coming on motorbikes and attacking their victim by surprise.[184]This modus operandi reflects the strategies adopted by Boko Haram during the reign of Mohammed Yusuf, thereby dismissing rumors that the group had effectively rearmed. They attacked more than 100 banks in Borno, Yobe, Adamawa, Bauchi, Katsina and Niger robbing them with an estimated amount of 7 million US dollars.[185] Consistently, they attack police stations, military barracks and security check-points because these are all reliable sources of getting military hardware with easy access for them, this as well signifies the strength or otherwise of the state.[186]

The command structure under Shekau comprises of groups functioning across the country. According to Jacob Zenn, the sect is ruled through a *shura* council headed by Abu

[180]Musa AliyuOdamah "Socio-economic incentives, new media and the Boko Haram campaign of violence in Northern Nigeria" (2012) 4(1*) Journal of African Media Studies*, 111
[181]Otu O. Duke, Dickson A. David and OkanBassey "Corruption and the Challenge of Boko Haram Terrorism in Nigeria: A Case of the Nigerian Armed Forces" (2017) 4(2) *Asian Journal of Arts and Social Sciences*,1
[182]Mohammed Kyari "The Message and Methods of Boko Haram" (2014) 2 *West African Politics and Society Series*, 9
[183]Perouse de Montclos "Nigeria's Interminable Insurgency?: Addressing the Boko Haram Crisis" (2014) *Chatham House Research Paper*, 6
[184]*ibid*
[185]TRAC, "Boko Haram: Coffers and Coffins; A Pandora's Box-The Vast Financing Options for Boko Haram" (2014) Available at: https://www.trackingterrorism.org/article/boko-haram-coffers-and-coffins-pandoras-box-vast-financing-options-boko-haram (Accessed February,2020)
[186]*ibid*

Shekau comprising of a representative for each group.[187] The body deliberates on issues that are essential to the strategy and coordination of the sect's activities.[188] For example, in April 2013, the Nigerian government offered clemency to the Boko Haram members but the shura council in declining the offer through its alleged spokesperson, Abu Dardam, resolved that democracy is not in conformity with the clear objectives of their movement, and thus, they would not accept any offer made by the government.[189] The organizational structure allows Boko Haram to plan and execute attacks in an organized and coordinated way.[190] In addition, each group commander has full autonomy to carry out attacks without first informing the central command.[191] This strategy has made it very difficult for the government and its security forces to weaken the threat of Boko Haram.[192] However, such strategy by Shekau has led to the split over of Boko Haram into different groups within the leadership as proved by the appearance of the Ansaru faction in 2012.[193]

1.7.4 The Split-Over of Boko Haram and Links with other Terrorist Organizations

As mentioned earlier, Shekau's strategy was not fully accepted within the shura council on concerns over unnecessary atrocities and the attack of Muslims led to the split over of Boko Haram.[194] A new faction with the slogan *Jama'atulAnsaruMuslimina fi Biladis Sudan* which translates as (Warden of protecting Muslims in Black Africa) was established in January,

[187] Jacob Zenn "Leadership Analysis of Boko Haram and Ansaru in Nigeria" (2014) 7(2) *Combating Terrorism Centre*, p 1
[188] *ibid*
[189] NdahiMarama "We are yet to decide on Amnesty-Boko Haram," Vanguard News, 2013. Available at: https://www.vanguardngr.com/2013/04/we-re-yet-to-decide-on-amnesty-boko-haram/ (Accessed February,2020)
[190] Mustapha Kulungu "Does Boko Haram Pose a Threat to the US?" (2019) 11(2) *Counter Terrorist Trend and Analysis*, p 1
[191] *ibid*
[192] Caitriona Dowd and Adam Drury "Marginalization, Insurgency and Civilian Insecurity: Boko Haram and the Lord Resistance Army" (2017) 5(2) *Journal of Peace Building*, P136
[193] Boko Haram Split in Leadership Crisis; Available at: https://www.dw.com/en/boko-haram-split-in-leadership-crisis/a-19449738(Accessed February,2020)
[194] *ibid*

2012.[195] The new group publicly declared its formation by sharing flyers in Kano city portraying their group as tolerant in contrast to Boko Haram led by Shekau.[196] The faction's primary targets are the security forces and Christians and would only attack Muslims in self-defense.[197] In June 2012, the self-imposed leader Abu Ansari - a *nom de guerre* for Boko Haram member Khalid Al-Barnawi, explained the ideological view of the group and reasons for its break up with Boko Haram.[198]

Even though they are ideally the same with Boko Haram, the Ansaru group mostly focused on activities of kidnappings.[199] The Nigerian government stated that the group's original name was "Al Qaeda in the Land beyond the Sahel" and has been in existence since around 2011 when it kidnapped two European expatriates in a construction site in Kebbi.[200] The Ansaru's tactics are presumably a reflection of the scheme of its new leaders who are considered to be Yusuf's initial deputies-Khalid al-Barnawi and MammanNur.[201] Both of them were once together with Abu Shekau and believed to have received training overseas. MammanNur purportedly escaped to Somalia after the crackdown of Yusuf's dent in 2009 and trained with Al Qaeda in the Islamic Maghreb (AQIM) and Al Shabaab militants.[202] While Khalid Al Barnawi allegedly had connections with AQIM in Algeria and oversaw kidnappings and smuggling activities alongside Mokhtar Belmokhtar, leader of the renowned In Amenas hostage operation in 2013.[203] According to reports, al Barnawi left Shekau over a

[195]Country Reports on Terrorism 2017-Foreign Terrorist Organization: Jama'atuAnsarulMuslimina fi Biliadis Sudan (Ansaru). Available at: https://www.refworld.org/docid/5bcf1f3c13.html (Accessed February,2020)
[196]*ibid*
[197]*ibid*
[198]*ibid*
[199]*ibid*
[200] Monica Mark "Nigeria's Militant Islamist Adopting a Disturbing Tactics" Available at: https://www.theguardian.com/world/2012/mar/08/nigerial-hostage-killings-boko-haram.
[201]Jacob Zenn "Boko Haram's Conquest for the Caliphate: How Al Qaeda Helped Islamist State Acquire Territory" (2020) 43(2) *Studies in Conflict and Terrorism*, p 89
[202]Jacob Zenn "Demystifying Al Qaeda in Nigeria: Cases from Boko Haram's Founding, Launch of Jihad and Suicide Bombings" (2017) 11(6) *Perspectives on Terrorism*, p 173
[203]Jacob Zenn "Cooperation or Competition: Boko Haram and Ansaru after the Mali Intervention" (2013) 6(3) *Combating Terrorism Center at West Point*, 1

ransom of about 40 million naira (250,000 dollars) he donated to Boko Haram in 2011 but Shekau refused to share among its members.[204]

The break-up of Boko Haram was basedonAnsaru's claim to protect Muslims around West Africa and Africa in general as opposed to Boko Haram's activities within Nigeria and isolated attacks around neighboring states. The Ansaru faction has so far launched two attacks only on Nigerian soil; attacked a prison in Abuja in November 2012, and another attack on Mali-attached Nigerian soldiers around Kogi in January 2013.[205] They justified their later action as a vengeance against Nigeria's armed forces involvement in Mali. Surprisingly, the rise of Ansaru occurred when Shekau travelled to Goa in northern Mali in 2012 regardless, the Ansaru did not set foot into Boko Haram's area of interest but rather stayed in Kano to conduct its activities.[206]

1.8 The Establishment of Multi-National Joint Task Force

In the past ten years, Boko Haram has metamorphosed from an internal uprising to a regional threat, undermining the security of Nigeria's neighbors with several cross-border attacks. The group's connection with other terrorist organizations such as the Islamic State and Al Qaeda, has placed them on the same level of global jihadi movements, and hence of instant and direct interest to the United States and its allies.[207] Acknowledging the immediate need to truncate the expansion of the group, and the incapacity of the Nigerian security forces to adequately handle the uprising, the African Union eventually rallied in 2015 to contain the threat.[208] In March of that year, the African Union Peace and Security Council agreed to deploy 7,500 MJTF for a period of 12 months, subject to renewal. The MJTF is mandated to carry out

[204]GiorgiaGentili "The Debate around the Evolution of Boko Haram's connections to Al Qaeda in the Islamic Maghreb" (2016) 3(1*) Security Terroristic Issues and Managing Emergencies*, p 9
[205]Ely Karmon "Boko Haram's International Reach" (2014) 8(1) *Perspective on Terrorism*, p 74
[206]Jacob Zenn "Boko Haram's International Connections" (2013) 6(1) *Combating Terrorism Center at West Point*, p
[207] Luca Raineri and Alice Martini "ISIS and Al Qaeda as Strategies and Political Imaginaries in Africa: A Comparison between Boko Haram and Al Qaeda in the Islamic Maghreb" (2017) 19(4) *Journal of Civil Wars*, p 425
[208]Habibu Yaya Bappah "Nigeria's military failure against Boko Haram insurgency" (2016) 25(2) *Journal of African Security Review*, p 146

military operations, coordinate at interstate level, patrol borders, prevent the flow of weapons, and find kidnapped persons under the supervision of the United Nations and the African Union.[209]

The MJTF was initially launched in 1998 to counter transnational organized criminal activities in the region of Lake Chad Basin, and was revived in 2012 to counter the security threat posed by Boko Haram.[210]However, the lack of a clear legal framework for the cross-border operations seriously affected communication strategy between them, and in January 2015, the headquarters of the MJTF located in Baga, northeast of Nigeria was attacked by Boko Haram and outgunned the MJTF, compelling them to abandon their base.[211] Thereafter, the Lake Chad Basin states, with the assistance of the AU and their allies, resolved to set up a collective military force, an initiative that was commended by the then chair of the AU commission NkosazanaDlamini Zuma who claimed that "collective, creative and decisive response" was necessary to contain the threat of Boko Haram.[212] Similarly, the initiative was applauded by the former UN secretary general Ban Ki-moon who explained that "those terrorists should be tackled with a regional and international support."[213] Even though Nigeria has refused the presence of UN peacekeeping on its soil,[214] the MJTF which comprises of forces from the Lake Chad Basin Commission (Chad, Cameroon and Niger) along with Benin Republic, is generally funded by UN-sourced special funds. The United States has

[209]*ibid*
[210]Multi-National Joint Task Force (MNJTF) against Boko Haram; Available at:https://www.africa-eu-partnership.org/sites/default/files/apf_factsheet_-_mnjtf.pdf (Accessed March, 2020)
[211]Isaac Olawale Albert "Rethinking the Functionality of the Multi-National Joint Task Force in Managing the Boko Haram Crisis in the Lake Chad Basin" (2017) 42(3) *Africa Development,* p 119
[212]Statement by the Chairperson of the African Union Commission DrNkosazanaDlamini Zuma to the 24th Ordinary Session of the Union Assembly of Heads of States and Government, 14th June, 2015. Available at: https://au.int/en/speeches/20150614-1 (Accessed March, 2020)
[213]UN Chief Backs Regional African force to fight Boko Haram. Available at:http://www.fahamu.org/ep_articles/un-chief-backs-regional-african-force-to-fight-boko-haram/ (Accessed March, 2020)
[214]BBC News, "Boko Haram Crisis: UN not needed against militants" Available at:https://www.bbc.co.uk/news/world-africa-30950628 (Accessed March, 2020)

alsocontributed5 million dollars,[215] whereas the UK and France are coordinating an "intelligence fusion cell" with the Nigerians.[216]

However, another area of concern for Nigeria has been about the lead commander of the MJTF. Obviously skeptical of foreign troops in the country, just like his predecessor Goodluck Jonathan, President Buhari also pushed on permanently retaining the leadership of the military coalition instead of the six-month rotational period of the command.[217] Following extensive discussions, the sponsors of the troops agreed that a Nigerian would hold the post of force commander pending the mission.[218] Whereas, a Cameroonian would hold the post of deputy force commander and a Chadian would be appointed as chief of staff for the first period of 12 months.[219] In June 2015, President Buhari renewed the pledge made under former President Jonathan to donate $100 million to cover the main cost of financing the MNJT.[220]Michael Nwankpa, a visiting fellow at the Baker Institute, expressed that the collective venture is responsible for reclaiming the communities from Boko Haram's control and killing many of them.[221]

1.8.1 Nigerian Territory under Boko Haram Control

Most damning for the Goodluck Jonathan administration is certainly the occupation and continues expansion of territory by Boko Haram in 2014.[222] Initially, the group settles in villages in the northeast of Borno state where there was scare presence of security

[215]Ben Ezeamalu "U.S donating $5 million, not $ Billion, to fight Boko Haram" Available at: https://www.premiumtimesng.com/news/headlines/185179-u-s-donating-5-million-not-5-billion-to-fight-boko-haram.html. (Accessed March, 2020)
[216]Financial Times, "UK to Ramp up Support to Nigeria" Available at:https://www.ft.com/content/22e0d6a0-1430-11e5-abda-00144feabdc0 (Accessed March, 2020)
[217]Andrew McGregor "Conflict at a crossroads: Can Nigeria Sustain its Military Campaign against Boko Haram?" Available at:https://www.refworld.org/docid/559d03d64.html (Accessed March, 2020)
[218]*ibid*
[219]*ibid*
[220]Daniel E. Agbiboa "Borders that continue to bother us: The Politics of Cross-Border Cooperation in Africa's Lake Chad Basin" (2017) 55(2) *Journal of Commonwealth and Politics*, 403
[221]Michael Nwankpa "Boko Haram: Whose Islamic state?" Available at:https://www.bakerinstitute.org/media/files/files/e37325ec/CME-pub-BokoHaram-050115.pdf (Accessed February, 2020)
[222]Cristina Barrios "Countering Boko Haram" (2014) European *Union Institute for Security Studies*, 1

forces.[223]Most of these settlements are so sprinkled that there is "not a friendly fenced town within a week's trip." This huge uninhibited area provided an ideal opportunity for Boko Haram to easily claim territory and consolidate its position. Village to village, the group amplified their grip throughout Borno state and parts of Yobe and Adamawa, gradually moving into areas where government forces were literally absent.[224]

Basically, Boko Haram was able to successfully acquire a vast territory for two reasons: First, convenient access to weapons enhanced their capability to launch terrible attacks, and secondly, the absence of the armed forces in these areas and the overall resistance to the progress of the terrorist group.[225] Boko Haram members were able seize some lethal weapons such as rocket launchers, armored vehicles or according to some sources allegedly purchased small arms that includes automatic weapons, rifles, grenades and mortars from the Nigerian military which completes a whole arsenal for them.[226] Similarly, the black market that spread over West Africa and the Sahel to the Mediterranean makes it easy for Boko Haram to get access to weapons.[227]

Accordingly, the Nigerian armed forces have consistently dumped one post after another, including one in Bama town around September 2014, which is the second largest town in Borno and just 40 miles away from Maiduguri.[228] A Chatham House report published in 2015 stated that the Nigerian military suffered from "lack of clear directive… lack of

[223]*ibid*
[224]Eme O. Innocent "The Case of Boko Haram activities in Nigeria" (2012) 2(2) *Arabian Journal of Business and Management Review*, p10
[225]Danielle Wiener-Bronner "Nigerian Military Officers Court-Martialed for Boko Haram Weapons" Available at: https://www.theatlantic.com/international/archive/2014/06/nigerian-generals-arrested-for-giving-boko-haram-weapons/372052/ (Accessed January 2020)
[226] Freedom C Onnuoha, ChikodiriNwangwu and Michael Ugwueze "Counterinsurgency Operations of the Nigerian Military and Boko Haram insurgency: Expounding the viscid manacle" (2020) *Security Journal*, p 149
[227]Ben Taub "Lake Chad: The World's most Complex Humanitarian Disaster" (2017). Available at:https://www.newyorker.com/magazine/2017/12/04/lake-chad-the-worlds-most-complex-humanitarian-disaster (Accessed January, 2020)
[228]Punch News, "Bama a ghost town after Boko Haram rule" Available at: https://punchng.com/bama-ghost-town-boko-haram-rule/ (Accessed January, 2020)

equipment and training."[229] The United States Congressional Research Service added "mismanagement of the security segment and corruption" to the extensive list of weaknesses portraying the armed forces.[230]

The establishment of Boko Haram state in the mountainous border town of Gwoza, Borno State, in August 2014 was a landmark success for Abu Shekau's goal.[231] In September 2014, Abu Shekau declared himself as the ruler of an Islamic caliphate in Nigeria and claimed to be the West African branch of ISIS.[232] This adjustment from the regular hit-and-run method to status of warfare was a dangerous game and proof of Shekau's illusionary state. However, in 2015, the Nigerian armed forces purportedly reclaimed the town of Gwoza and pushed them out from their garrison.[233] In the meantime, Abu Shekau aimed to expand his territorial claim through the borders of Chad and Cameroon along the Lake Chad region.[234] This added misjudgment by Abu Shekau helped in uniting the military coalition between the neighboring states.

The rise and successes of Boko Haram in 2014 clearly revealed that it had the intention and ability to establish a sectarian state in northeast Nigeria. This is not surprising because Abu Shekau has for a long time have been making reference to the Sokoto Caliphate headed by Usman Dan Fodio in the 19th century, which he wanted to emulate.[235] Now that it

[229] Elizabeth Donnelly "Boko Haram Massacre: Seven Questions worth Asking" Available at: https://www.chathamhouse.org/expert/comment/boko-haram-massacre-seven-questions-worth-asking (Accessed January,2020)
[230] Lauren Ploch Blanchard, "Nigeria's 2015 Elections and the Boko Haram Crisis; U.S Congressional Research Service" Available at: https://fas.org/sgp/crs/row/R43881.pdf (Accessed January, 2020)
[231]Laura Grossman "Analysis: Boko Haram focuses on seizing territory" Available at:https://www.longwarjournal.org/archives/2014/08/new_emerging_goals_o.php (Accessed January,2020)
[232]*ibid*
[233]BBC News, "Boko Haram HQ Gwoza in Nigeria 'retaken'" Available at:https://www.bbc.co.uk/news/world-africa-32087211 (Accessed January,2020)
[234]Viviane E Foyou, Peter Nwafu, Maribel Santoyo and Andrea Ortiz "The Boko Haram Insurgency and its Impact on Border Security, Trade and Economic Collaboration between Nigeria and Cameroon: An Explaratory Study" (2018) 9(1) *African Social Science Review*, p 66
[235]Kim Searcy "All Politics is Local: Understanding Boko Haram" (2016) 9(9) *Loyola University Faculty Publications and other Works*, p 2

had adequate troops, Boko Haram was able to change from irregular warfare to a blend of guerilla and terrorist strategies, conducting offensives on large cities and military barracks.[236]

In the meantime, as Boko Haram continues to expand its territory, and enhances its workforce by coercing men and boys into its militia while women and girls as hostages and sex slaves.[237] Boko Haram was able to record such success because of the degradation and demoralization of the Nigerian security forces and the government temporarily weakening any opposition to the group's territorial invasions. Abu Shekau was therefore able to exaggerate the public view of Boko Haram's strength and capabilities and raise its credibility in the midst of like-minded groups such as Al Qaeda and ISIS.

1.8.2 Is Boko Haram a Nigerian Problem?

For some researchers, Boko Haram emerged as a result of identity politics and division within communities that have characterized the country since the colonial period.[238] It is seen to be an effect to the endemic corruption apparently encouraged by the educated elites and their cohorts in power.[239] Similarly, the government's refusal to note the gross inequalities between the north and the south of the country has exacerbated existing feelings of political alienation.[240] Therefore, it is difficult for the country to avoid any violent social movement by a society that feels disenfranchised of continuous suppression. A study by Freedom Onuoha on youth radicalization appears to corroborate this opinion as poverty, joblessness, illiteracy,

[236]The Guardian, "Boko Haram launches series of attacks in North-East Nigeria" Available at:https://www.theguardian.com/world/2018/dec/28/boko-haram-launches-series-of-attacks-in-north-east-nigeria (Accessed January,2020)
[237]David Sverdlov "Rape in War: Prosecuting the Islamic State of Iraq and the Levant and Boko Haram for Sexual Violence against Women" (2017) 50 *Cornell International Law Journal*, 334
[238]Wisdom O Iyekekpolo "The Political process of Boko Haram insurgency onset: A political Relevance Model" (2019) 12(4) *Journal of Critical Studies on Terrorism*, 673
[239]Wisdom O Iyekekpolo "Political Elites and the Rise of the Boko Haram Insurgency in Nigeria" (2018) *Journal of Terrorism and Political Violence*, 2
[240]Evans Olaniyi I Kelikume "The Impact of Poverty, Unemployment, Inequality, Corruption and Poor Governance on Niger-Delta, Boko Haram Terrorism and Fulani Herdsmen Attacks in Nigeria" (2019) 8(2) *International Journal of Management, Economics and Social Sciences*, 58

and weak family structures are identified to be the key causes for Boko Haram's conscription approach.[241]

For some, the too aggressive response of the security forces may have aggravated the situation.[242] Merited or not, the Nigerian police has a standing reputation for being fanatical with social and political unrest[243] as confirmed in its management of the Maitatsine armed conflict in the 1980s.[244] Amnesty International has reported cases of torture, extra-judicial killings and rape perpetuated by both the police and soldiers.[245] Principally, Boko Haram launches vengeance against those that it regards as an adversary such as the Nigerian police.[246] The Nigerian police became their primary target when the police force raided the Boko Haram headquarters and the subsequent killing of its leader Mohammed Yusuf in its custody in 2009.[247] In the periods of 2009 to 2013, about 90 percent of Boko Haram's attacks in the northeast were aimed at police stations and the armed forces.[248] These lend credence to the suggestion that the failure in defeating Boko Haram is as a result of the state's unprofessional management of the insurgency. However, Onuoha'sfindings conclude that the alleged unrestrained actions of the security forces are the least driving forces of youth

[241] Freedom Onuoha "*Why Do Youth Join Boko Haram?* (Washington, DC: United States Institute for Peace, 2014)

[242]YahayaYakubu "State and Conflict Management: Evaluating Nigeria's Response to Boko Haram Insurgency" (2018) 2(6) *International Journal of Research and Innovation in Social Science*, 63

[243]Usman A Ojedokun "Contributing Factors to Police Homicide in Nigeria" (2014) 87(1) *The Police Journal: Theory, Practice and Principles*, 41

[244]AdemolaAdesoji "Boko Haram Uprising and Islamic Revivalism in Nigeria" (2010) 45(2) *Africa Spectrum*, 95

[245]Amnesty International "Nigeria's Torture Chambers Exposed in New Report" Available at: https://www.amnesty.org/en/latest/news/2014/09/nigeria-s-torture-chambers-exposed-new-report/ **(**Accessed 30th January, 2020).

[246]Heidi Schultz "Nigeria's Boko Haram: Who are they and what do they want?" Available at: https://www.nationalgeographic.com/news/2014/5/140507-boko-haram-nigeria-borno-state-maiduguri-mohammed-yusuf-abubukar-shekau-goodluck-jonathan-world/ **(**Accessed 30th January 2020)

[247]OsaretinIdahosa "Boko Haram and the Nigerian State: A Different Perspective" (2015) 3 *Journal of Culture, Politics and Innovation*, 2

[248]SuranjanWeeraratne "Theorizing the Expansion of the Boko Haram Insurgency in Nigeria" (2017) 29(4) *Journal of Terrorism and Political Violence*, 610

fanaticism and violence, which of course is not absolutely disregarded as a factor of radicalization.[249]

For a while, Boko Haram was depicted as a phenomenon of northern Nigeria particularly the northeast, supported and sustained by politicians who allegedly hold against the former president Goodluck Jonathan.[250] This sequence of events dominated the Nigerian media for a while until the president sought for international support to overcome the terrorist threat.[251] The present regional impact of Boko Haram is unquestionable but, its international reach is certainly debatable.[252] The manner in which Boko Haram is depicted... as a local insurgency, a terrorist group or a sociopolitical movement-can influence the manner in which it is tackled but, also gives it credibility to promote its agenda and hunt for coalition with like-minded terrorist organizations within or without the country.[253] To a large extent, this has shaped the evolution of the insurgents, regardless of whether it began as a Nigerian problem.

1.9 Conclusion

Any leader in Nigeria will encounter the problem of governing a multi-ethnic and religiously divided nation. To avoid the threat of sectarian insurgencies and separatist ambitions, the president must address and cater the demands of every citizen, which starts with reducing the north – south divide. Disparity is a catalyst for anger, envy, frustration, and violence. While the military forces can thwart uprisings to a degree, a committed investment in the infrastructure and education of all regions in Nigeria is crucial to make a nation out of all these people. Religious frictions have also been exacerbated by environmental degradation and competition for wealth and power. Modernity and the infiltration of new ideas are often

[249]*Supra,* note Freedom C Onuoha
[250]Daniel C. Chukwurah, EmeOkechukwu and Eunice N Ogbeje "Implication of Boko Haram Terrorism on Northern Nigeria" (2015) 6(3) *Mediterranean Journal of Social Sciences*, 371
[251]Abdullahi T Abubakar "The Media, Politics and Boko Blitz" (2012) 4(1) *Journal of African Media Studies*, 97
[252]LoannisMantzikos "Boko Haram Attacks in Nigeria and Neighboring Countries: A Chronology of Attacks" (2014) 8(6) *Journal of Terrorism Research Initiative*, 63
[253]Freedom C Onuoha "The Islamist Challenge: Nigeria's Boko Haram Crisis Explained" (2010) 19(2) *Journal of African Security Review*, 54

threatening to groups of people who find themselves trapped between two worlds, desperately searching for their bearings to maintain a sense of identity. This, together with scarcity of economic opportunity and educational outreach, has exacerbated the hostile situation of the country.

The emergence of Boko Haram in northeast Nigeria is broadly similar to other terrorist organizations across the world. Unable to grapple with the transformations of the contemporary world and left behind by the accelerated economic and cultural changes occurring in their environment, an increasing proportion of the population, particularly youths, have become easy targets for extremists groups. While Boko Haram may remain a Nigerian problem, understanding the dynamics of the insurgency can help inform government authorities and how to respond to the increasing threat of radical groups in the country.

Chapter Two

Legal Framework of International Humanitarian Law

2.0 Introduction

International humanitarian law (IHL) or the *jus in bello* (law in war) is one of the oldest bodies of international law, and aims to govern the actions of States and individuals taking part in an armed conflict, and to protect people and property. The law aims at balancing two objectives: the demands of the armed forces of a State (or non-State armed group) to prosecute the armed conflict, and the humanitarian requirement to protect persons who do not, or cease, taking direct part in the conflict (also called *hors de combat* or "out of combat").[254] Originally, the law only governed the actions of States in international armed conflicts; at present, the law regulates the actions of States and non-State actors, in international and non-international armed conflicts, and consists a wide range of rules, drawn from treaties, Statutes, customary international law and other sources, covering weapons, means and methods of warfare, including distinction, proportionality and precautions in attacks.[255]

As noted above, the essence of IHL is to regulate actions in armed conflicts. On the face of it, such aim would appear senseless – how can one govern warfare? How can you proscribe certain types of killings, wounding and destruction of properties, while allowing other types of violence? Indeed, this sentiment was stated by Admiral Lord Fisher, First Sea Lord of the Royal Navy: "the humanizing of war! You might as well talk of the humanizing of Hell … As if war could be civilized! If I'm in command when war breaks out I shall issue mu order – 'The essence of war is violence. Moderation in war is imbecility. Hit first, hit

[254]ICRC, "IHL and other Legal Regimes – jus ad bellum and jus in bello, available at:https://www.icrc.org/en/doc/war-and-law/ihl-other-legal-regmies/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm (Accessed May 2019)
[255]*ibid*

hard, and hit everywhere.'[256] However, counter to Fisher's grim picture, history has demonstrated that over the years many societies, from diverse parts of the world, have sought to put restrictions on conduct in situations of armed conflicts.[257] In fact, IHL, in its contemporary incarnation, is basically pragmatic in its approach – even though the resort to force by States is proscribed by the world community as enshrined in the UN Charter, armed conflicts will unavoidably occur. IHL aims to restrict the severity of the conflict, imposing limitations and standards on those who engage or participate in the armed conflicts.[258] In response, Solis has argued that "the idea of conflict as indiscriminate violence suggests violence as an end itself, and that is antithetical to the fact that war is a goal-oriented activity directed to attaining political objectives."[259]

In order to achieve its objectives, IHL is regulated by certain fundamental principles, reviewed in the second half of this chapter. However, there are certain rules of IHL that needs to be examined regarding the dichotomy of armed conflicts. This will help us understand the type of Boko Haram armed conflict and the exact laws that apply to it.

[256] Sir Reginald Bacon, *The Life of Lord Fisher of Kilverstone, Admiral of the Fleet*, (New York: Doubleday, Doran & Co., 1929) 120
[257] Marco Sassoli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law,* 3rd Ed (Geneva: ICRC, Press, 2011) 3-7
[258] Marco, *How Does Law Protect in War?*114
[259]Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010) 7

2.1 Legal Basis and Review of Related Literature

This section examines the literature on the subject of laws governing armed conflicts and enforcement of international humanitarian law with a view to ascertaining the current state of the law on the subject matter and to determine the value this study would add to the legal and institutional redress system regarding the focus (Boko Haram) of the research. It further presents information on the various laws regulating the different forms of armed conflicts, showing its impact on human dignity, and the polity in itself. The relevant literature to thisresearch is the debate on the legal framework to armed conflicts; the nature of armed conflicts, including international armed conflicts, non-international armed conflicts and transnational armed conflicts.

Furthermore, the section juxtaposes the reviewed legal framework applicable in armed conflicts with the reality. Specifically, the case of Boko Haram armed conflicts in the North-Eastern region of Nigeria and the Polasrio Front of Western Sahara were analysed in order to understand the specific place of Boko Haram armed conflict under IHL and how the challenge of enforcing IHL by the Nigerian government requires further scrutiny. There is a growing awareness on the subject of transnational armed conflict which does not consist of the formal dualistic approach of international and non-international armed conflicts. From the review below, I discussed the transnational element of Boko Haram armed conflict and the applicable law under IHL to assist in analysing the challenge of enforcing IHL, with a specific focus on sexual violence in the Boko Haram conflict in North Eastern Nigeria. The section is divided into sub-themes and they are considered - hereunder in that order.

2.2 International Armed Conflict

As earlier stated, the law of armed conflict does not apply to all situations where armed force or violence is used; it applies to only certain types of conflict. In general terms, the full collection of IHL rules, apart from Additional Protocol II, will apply in an international

armed conflict, while a non-international armed conflict will be subject to Common Article 3 of the 1949 Geneva Conventions, the Second Additional Protocol of 1977 to the Geneva Conventions, customary international humanitarian law.

Even though the term 'international armed conflict' is widely used, it is not defined in any IHL treaty; in fact it does not appear in The Hague or Geneva Conventions, emerging for the first time in Additional Protocol I in 1977. As reviewed below, international armed conflicts now involve not only those between States, but also situations where territory is occupied, and conflicts between government armed forces and national liberation movements.

2.2.2 Common Article 2 Armed Conflicts

Article 2 Common to the four Geneva Conventions stipulates that the Conventions would apply in possibly three different circumstances: declared war (with or without actual confrontations), inter- State armed conflict, and where territory is occupied:

> Article 2 – In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets no armed resistance.

2.2.3 War vs. Armed Conflict

The initial treaties on the Laws of Armed Conflict applied between States, and only in war situations. For instance, in this light, the 1899 Hague Regulations, provided that "the provisions contained in the Regulations stated in Article 1 are only binding on the Contracting Powers, in case of war between two or more of them."[260] This latter condition provided no difficulties when States formally declared war on each other, but there were several situations of military actions that were similar to war, yet had not been preceded by

[260] Article 2 Hague Regulation II 1899

any declaration – such as Japan's actions in China in the 1930s, as well as Italy's invasion of Ethiopia in 1935.[261] In the absence of any definition of war, states could easily, if they wanted, describe their conflicts as involving forcible measures short of war, and thereby avoid the legal consequences of being at war such as the application of the LOAC.[262]

Thereby, with the establishment of the United Nations in 1945[263] the global community came to an arrangement to proscribe the use of armed force[264] in inter- State relations, unless it is authorized by the UN Security Council[265] or in Self-defense.[266] Since then, no State could declare war (unless in the limited situations of lawful self defense) without contravening the UN Charter – another reason for States to avoid formal declarations of war.[267]

The States conference in 1949 to conclude the texts of the Geneva Conventions took account of these events and decided that the Conventions would apply not just to "all situations of declared war" but also to "any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[268] This formulation ensures that the Conventions apply following any declaration of war, even if there is no actual fighting, as well as to any armed conflict between States, irrespective of whether a war is declared or recognized.[269] The other instances in which the Conventions apply are reviewed below.

[261]Fenwick C G "War without a Declaration" (1937) 31(4) *American Journal of International Law*, 694
[262]*ibid*
[263]Charter of the United Nations, San Francisco, 26 June 1945, in force 24 October 1945,
[264]Article 2(4) UN Charter
[265]Article 42 UN Charter
[266]Article 51 UN Charter
[267]Self –defense is acceptable in response to an armed attack and as a provisional measure until the UN Security Council can decide and act: Article 51 UN Charter; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*) Judgment, (1986) ICJ Rep. Paras 115, 216, 255 - 6
[268]Article 2 Common to the four 1949 Geneva Conventions
[269]Andrew Clapham "The Definition of Armed Conflict and the Additional Protocols of 1977" available at: http://www.iihl.org/wp-content/uploads/2017/11/Clapham-San-Remo-2017.pdf (Accessed May 2020)

2.2.4 What is an Armed Conflict?

According to the ICRC, an armed conflict exists as soon as there is "resort to armed force between two or more States."[270] This wording follows the ICTY*Tadic*Judgment[271] and is highlighted by the ICRC as meaning "recourse to armed force [by one state] against another State, irrespective of the reasons or the intensity of this hostility."[272] Likewise, the Commentary to the Geneva Conventions, also expounds that an armed conflict is "any difference arising between two States and leading to the intervention of armed forces [irrespective] of how long the conflict lasts, or how much slaughter takes place."[273] In line with this, the ICRC explains that an armed conflict exists whenever one State uses armed force against another, and that the duration and intensity of the conflict are immaterial.[274] Some legal scholars refer to this as the "first shot" theory, whereby an armed conflict exists, and as a result IHL applies, once force is employed.[275]

The International Law Commission (ILC) also adopted the *Tadic* wording in its 2011 Draft Articles on the effects of armed conflicts on treaties, characterizing international armed conflict as "a situation in which there is resort to armed force between States."[276] No threshold necessity is suggested by the ILC, but in any case the commentary to the Draft Articles clearly states that the use of this definition is for the purposes of treaty law, which is the subject of the Draft Articles, and not aimed to affect the rules of IHL.[277] While other

[270]ICRC How is the Term Armed Conflict Defined in International Humanitarian Law? Opinion Paper 2008 at 5; available at:https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf (Accessed April 2020)
[271]*Prosecutor v Tadic*, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70 (*hereinafter Tadic Jurisdiction Appeal*)
[272]ICRC, "How is the Term 'Armed Conflict Defined' Defined" at 1
[273]GC I Commentary, 32
[274]ICRC, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts," Geneva, October 2011, pp 7-8, available at: https://www.icrc.org/en/doc/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm (Accessed April 2020)
[275]John K Kleffner, "Scope of Application of International Humanitarian Law," in Dieter Fleck, *The Handbook of International Humanitarian Law* 3rd Ed (Oxford University Press, 2013) 44
[276] Article 2(b) ILC, Draft Articles on the Effects of Armed Conflicts on Treaties with Commentaries (2011), available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_10_2011.pdf (Accessed April 2020)
[277]*Ibid*, Article 2(4)

scholars believe that isolated cases or minor skirmishes, even involving armed forces, do not constitute armed conflict, and that minimum requirements of duration, intensity and the intention of the parties, must be fulfilled. The UK Ministry of Defence, for instance, states that an accidental bombing or unintentional border invasion would not amount to an armed conflict.[278]Dinstein and Solis considered that a border incident would not constitute an armed conflict as long as it is over soon and neither of the parties intends to involve in armed conflict.[279] In 2010, the International Law Association (ILA) noted that "State practice, judicial opinion, and majority of writers uphold the position that hostilities must attain a certain degree of intensity to qualify as an armed conflict."[280] The ILA attempted to resolve the issue that this approach would leave a legal vacuum where inter-State violence was not regulated by IHL, indicating that in practice, IHL can be and is on occasion applied by States even without armed conflict.[281] This is not a comprehensive response, however, since it appears to leave the application of the law to the discretion of the States concerned.

Yet other scholars seek to reconcile these positions. They favor the opinion that an armed conflict exists when there is resort to armed force between States, in order that there can be no legal gap in the period between that moment and the confrontations attaining the threshold requirements explained above.[282] They view that there is no reason why IHL should not be applicable in all situations. However, they noted that in practice only the rules of IHL are important to the particular situations will apply. Therefore, in a nutshell, minor border incidents; very few rules of IHL will be relevant; however, if during the incident a member of

[278] UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, (Oxford University Press, 2004) 29
[279]YoramDinstein, *War, Aggression and Self Defence*, 5th Ed (Cambridge University Press, 2011) 11; Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010) 151-2
[280]International Law Association, Use of Force Committee: Final Report on the Meaning of Armed Conflict in International Law, p 29; available at:http://www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf (Accessed April 2020)
[281]*ibid*, 30
[282]*Supra*, note 275 at 44

the opposing armed forces are held prisoner, the rules on prisoners of war will regulate that person's treatment; and so on, etc.[283]

2.2.5 Occupation

Aside from declared war and actual armed conflict, Common Article 2 extends the Geneva Conventions to all cases of belligerent occupation – situations where territory is occupied by a foreign troop, whether or not the occupation is confronted. If territory is occupied during armed confrontations, the situation is covered by the first paragraph of Common Article 2 – declared war or other armed conflict.[284] Sometimes, however, territory is occupied without any accompanying confrontations. The States discussing the Geneva Conventions were mindful that during the 2nd World War territories such as Denmark had chose not resist German occupation, considering resistance to be pointless. In drafting the Geneva Conventions, hence, the second paragraph was added to Common Article 2 to rule out the likelihood of an occupying power rejecting to adhere to the laws and customs of war on the ground that the occupation was not part of a war or other armed conflict.[285]

2.2.6 National Liberation Movements and the Laws of Armed Conflict

As discussed above, Additional Protocol I to the Geneva Conventions builds upon Common Article 2 and applies the Convention as well as the Protocol not only to armed conflicts as provided in that Article, but also to:

> "1(4) Additional Protocol I … armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as encoded in the Charter of the United Nations and the Declaration of Principles of International Law regarding Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

When Additional Protocol I was passed in 1977, these types of hostilities – conflicts of national liberation – had been dominant since the late 1940s as colonies fought for

[283] *Ibid*
[284] GC IV Commentary, p 21
[285] Article 1(4) Additional Protocol I

independence from their hesitant colonial powers.[286] Such conflicts had conventionally been regarded to be 'internal problems' for the colonial powers involved, not international conflicts, and hence to a large extent, beyond the reach of IHL. In the prolonged negotiations resulting in the 1977 Additional Protocols, however, emerging States succeeded in having these conflicts categorized as international in AP I, as a consequence of which the rules of IHL, especially those concerning to prisoners of war and occupation, would apply to their contests for independence.[287]

There are several States that opposed this development.[288] The major disagreements were that the formulation of Article 1(4) was ambiguous and that it created subjective and political concepts into international humanitarian law, thereby rooting the law's application on the motives or drives of the armed group.[289] The considerable differences between the negotiating countries worsened when a vote was called on this provision, and instead of following the conventional pattern of consensus adoption or approval, this flagrant lack of consensus significantly weakened the power of the provision and, some argue, the Protocol in general.[290]

While over time most countries have adhered to the Protocol, considerable number of countries are not parties; including Indonesia, India, Sri Lanka, Myanmar, Nepal, Thailand, Iran, Israel, Pakistan, Turkey and the United States, most of which were or are facing secessionist conflicts.[291] Furthermore, several countries have also made reservations to multiple provisions in the Protocol.[292] The Protocol does not just apply in a war of national

[286]Additional Protocol Commentary, para 68
[287]*Ibid*
[288]See Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-77) 16 (Federal Political Department, 1978)
[289]Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press, 2010) 73-9
[290]*Ibid*
[291]See ICRC, Table of Treaties and State Parties to such Treaties; available at:https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (Accessed August 2020)
[292] Gary Solis, *The Law of Armed Conflict* (Cambridge University Press, 2016) 123

liberation: its application requires fulfillment not just of the conditions in Article 1(4) mentioned above but also those in Article 96 (3) of the Protocol.[293] This stipulates that the leadership or authority that is acting on behalf of the relevant people (those fighting the war of national liberation) may forward a declaration to the Swiss authority as depository of the Protocol, committing to employ the Geneva Conventions and Additional Protocol I in their conflict. Where such a declaration is made, the leadership or authority making it instantly becomes a party to the conflict and liable to all the rights and obligations of those agreements.[294] Although not explicitly provided in AP I, most view is that an Article 96 (3) declaration is a sine qua non for the application of AP I to an Article 1(4) conflict.[295] Under Article 96 (3), national liberation movements have the right to select whether or not to abide with IHL, as far as it goes beyond customary law.[296] Therefore, where a declaration is not made, the Geneva Conventions and AP I would not apply to the conflict.[297]

However, an additional condition of Article 96 (3) requires that the State against which the war is being fought must be a party to the Protocol.[298] If the State is not party to the Protocol, the declaration may (potentially) as a result, lead to a unilateral commitment by the national liberation movement to the responsibilities encoded in the Geneva Conventions and the AP, but will have no effect on the State.[299] Since all the countries to which Article 1(4) was principally likely to apply either did not become parties until after the conflict was over,

[293]Dieter Fleck, *The Law of Non-International Armed Conflict: From the Handbook of International Humanitarian* Law, 3rd Ed (Oxford University Press, 2013) 583
[294] Article 96 (3) Additional Protocol I
[295]Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012) 220
[296]AP Commentary Para 3765
[297]With exclusion of the possible application of common article 3
[298]Article 96 (3) AP I
[299]AP Commentary, Paras 3770-5: The Commentary stipulated that the opinion held by some countries that national liberation movements could be considered as 'Powers' within the wording of Common Article 2, Para 3 ofthe 1949 Geneva Conventions, which notes that parties to the Conventions shall be bound by them in their relation with a non-state party power (i.e. a national liberation movement) if the latter accepts and adopts their provisions

or are still not parties, its probable scope of application was and remains restricted.[300] As expected,ahandful of Article 96 (3) declarations has been made and most were rejected or not considered as effective by the depository.[301] A good example in this regard is the declaration made by the National Democratic Front of the Philippines in 1996,[302] when it was not a party to the Protocol, and as such, the declaration was rejected by the depository.[303] Another issue for the NDFP was that it is widely recognized that Article 1(4) does not apply to every type of secessionist or revolutionary movement; the list of types of conflict in Article 1(4) is extensive and limited to those surely in the minds of the negotiating States in 1977: those against colonial domination, foreign occupation and racist regimes.[304] For all these grounds some scholars reject Article 1(4) as outdated,[305] but others observe that its future application is by no means impossible: colonies still exist, and foreign occupation or a racist regime might be established somewhere.[306] To this day, there are arguably hostilities that are covered by the scope of Article 1(4) of AP I.[307]

However, in the event where the Conventions and Protocol do not apply to the hostilities, the consequence is that such a conflict will not be subject to the customary and treaty obligations regulating international armed conflict. This is due to the fact that it is only through Articles 1 (4) and 96 (3) that conflicts of national liberation can be characterized as international armed conflicts. However, this does not imply that the armed conflict is not regulated by IHL, rather, there is the possibility to characterize the conflict as NIAC, and will be subject to the growing of both treaty and customary law applicable to such hostility.

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[300]Example of colonial powers that became party – United Kingdome became a party in 1998; Portugal 1992 and France in 2001; and Israel is not a party: See ICRCs' table of treaties above
[301]Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd Ed (Manchester University Press 2008) 70
[302]National Democratic Front of the Philippines, NDFP Declaration of Undertaking to apply the Geneva Conventions of 1949 and Protocol I of 1977, 5 July 1977; available at:https://ndfp.org/ndfp-declaration-of-undertaking-to-apply-the-geneva-conventions-of-1949-and-protocol-i-of-1977/ (Accessed March 2020)
[303]The Philippines Ratified AP I in 2012: See ICRC Table of Treaties above
[304]*Supra*, note 295 at 217-20
[305] Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing) 77
[306]*Supra*, note 295 at 219
[307]AP I Commentary 3770-5

2.3 Non-International Armed Conflict

Like all concepts in legal scholarship, practitioners and scholars have had extended arguments about all forms of armed conflicts including non-international armed conflict. But there is little evidence as to the point of agreement on the definitional framework that is acceptable to all. This statement is particularly relevant to the concept of non-international armed conflict defined by the Appeal Chamber as "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[308] The view expressed by the Appeal Chamber in its conceptualisation of non-international armed conflict is not consistent with the position of Geneva Convention's Common Article 3. Again, it does not fit into the specific notion of non-international armed conflict contended in the Second Additional Protocol to the Geneva Conventions.

In an attempt to rationalise the inherent differences in the definitions, Kritsiotis explicitly notes that Common Article 3 is limited and does not extend the application beyond "each party"[309] to a non-international armed conflict."[310] To further rationalise the importance of "each party" as emphasised in the definition provided by Common Article 3, Kritsiotis notes the following:

> "An important stipulation, one not to be underestimated because it raises the question of whether governmental armed forces that suddenly turn on the civilian population-with no other "party" in sight--can properly be said to have instituted a non-international armed conflict. As Trial Chamber I of the International Criminal Tribunal for Rwanda said in respect of Common Article 3 in Prosecutor v. Jean-Paul Akayesu, Case No. ICTY-96-4-T (Sept. 2, 1998): "The term 'armed conflict' in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent. This consequently rules out situations of internal disturbances and tensions. For a finding to be made on the existence of an internal armed conflict in the territory of Rwanda at the time of the events alleged, it will therefore be necessary to evaluate both the intensity and organization of the parties to the conflict."[311]

Conversely, the Second Additional Protocol is limited to specific forms of non-international armed conflicts, in other words ones:

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[308] Greenwood, Christopher "International Humanitarian Law and the Tadic Case" (1996) 7 *European Journal International Law*, 265
[309] Kritsiotis, Dino "The Tremors of Tadić" (2010) 43(2) *Israel Law Review*, 283
[310] *Ibid*
[311] *Ibid* at 283

> "Which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."[312]

Similar to the elaborate explanation provided to rationalise the use of the term "each party" to the non-international armed conflict in the Common Article 3, Kritsiotis offers the following rationalisation for the words used in the Second Additional Protocol relating to specific forms of non-international armed conflicts:

> "This qualification is important not only because of its relation with Common Article 3 of the Geneva Conventions-but because it acts as a qualification of the statement, also found in Article 1(1), that the Second Additional Protocol "shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949." The Second Additional Protocol was therefore not intended as a default mechanism for all of those armed conflicts not coming within the provenance of the First Additional Protocol."[313]

A close review of these two legal instruments (Common Article 3 and the Second Additional Protocol) suggests an attempt by the drafters of the Second Additional Protocol to build up specific stipulations that were absent in Common Article 3.[314] Particularly, this new approach (Second Additional Protocol) attempts to provide a clear identification of the participants (actors) in the non-international armed conflict. These actors include "armed forces [of the High Contracting Party] and dissident armed forces or other organized armed groups")," but also in terms of dissident armed forces or other organized armed groups it is directed toward (those "under responsible command, [which] exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."[315]

[312] Second Additional Protocol (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S 609), Article 1 (1)
[313] *Supra*, note 309 at 283
[314] Abi-Saab, Rosemary "Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern" (1991) 91 115
[315] *Supra*, note 309 at 283

In any case, the dictum in the*Prosecutor v. DuskoTadic*notedthatthe most fundamental issue is that the rules of IHL apply to both instances of international and non-international armed conflicts.[316]

Another angle through which the *Tadic*jurisprudence has been helpful is in its definition of, and qualification of the nature of armed conflicts; specifically, the extent to which a conflict can be qualified as an internal armed conflict is where the judges opined that all conflicts occurring within a state qualifies as non-international armed conflict. However, it noted this only when such conflict is characterised by "protracted armed violence."[317] More specifically, the Second Additional Protocol noted that the term does not include smaller scales of uprising within a state –"shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[318]

Again, the *Tadic* Appeal Judgment did not specify the actors that will need to be involved to qualify for a non-international armed conflict. In other words, all of the qualifications highlighted in the Second Additional Protocol are not attached to any specific group of actors to define the existence of an internal armed conflict. By this, the ICTY sought to provide the customary law definition of non-international armed conflict. The *Tadic*Appeal Chamber noted that protracted armed violence between governmental authorities and organized armed groups or protracted armed violence between such groups within a State will suffice as non-international armed conflict.[319] In essence, if the criteria are not met by a

[316]*Prosecutor v. Tadic* Case No IT-94-1-AR72 (Oct. 1995) Appeals Chamber (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) Para 70 International humanitarian law applies from the initiation of such [i.e. international] armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there
[317]Smith, Dan "*Trends and Causes of Armed Conflict*" In Transforming Ethno political Conflict Ed. (Springer Fachmedien Wiesbaden, 2004) p 112
[318]Second Additional Protocol II, Article 1(2)
[319]*Prosecutor v. Tadic* (Jurisdiction) Para 70

situation, there is no armed conflict. Banditry, unorganized or short lived uprisings or terrorist activities are thereby excluded from the applicability of the 1949 Conventions.[320]

The customary status of the *Tadic* definition is supported by its incorporation in the Statute of the International Criminal Court,[321] although the definition is still termed in the abstract, and whether a situation is stated as an armed conflict, satisfying the requirements of Common Article 3, is to be decided upon a case by case basis.[322] In respect of Article 8(2) (f) the Pre-Trial Chamber II of the International Criminal Court in *Prosecutor v. Jean-Pierre Bemba* noted that: "In the view of the Chamber, this is ultimately a limitation on the jurisdiction of the Court itself, since if the required level of intensity is not reached, crimes committed in such a context would not be within the jurisdiction of the Court."[323] Regardless, it appears to be customarily accepted that when organized armed groups take part in hostilities attaining a certain level of intensity, the rules of non-international armed conflict will come into force.[324]

2.4 Trans-national Armed Conflicts

Legal scholars have often noted that the conventional boundary separating international and non-international armed conflict is the territory on which the conflict takes place. In other

[320]Dinstein, Yoram*Non-International Armed Conflicts in International Law* (Cambridge University Press, 2014)
[321] Article 8 (2) (f) "Paragraph 2(e) applies to armed conflicts not of an international character and hence, does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a related nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between government forces and organized armed groups or between such groups." In this regard, Noelle noted that the change of the term "armed violence' in the *Tadic* judgement to "armed violence" in the ICC Statute could suggest the raising of the threshold of application but it is difficult to discern the relevance in practical application. Noelle Quenivet "The Applicability of International Humanitarian Law to Situations of a (counter-)terrorist Nature, in Roberta Arnold, Pierre-Antoine Hildbrand*International Humanitarian Law and the 21st Century's Conflicts – Changes and Challenges* (Edis, 2005) 35
[322]*Prosecutor v. Rutaganda* Case ICTR-96-3 (Judgement, 6 December 1999) para 91
[323]*Prosecutor v. Jean-Pierre Bemba Gambo* Case N0 ICC-01/05-01/08 [June 15, 2009] (Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges Against Jean-Pierre Bemba Gambo) at para 225
[324] ICRC Commentary of 2016 Article 3: Conflict not of an International Character stated that: "In any case, the criteria of intensity and organization must be present cumulatively in order for a situation of violence to reach the threshold of a non-international armed conflict. Depending on the circumstances, however, it may be possible to draw some conclusions from one criterion for the other. For example, the existence of highly intense armed confrontations between State authorities and non state armed groups, or between several non-state armed groups, may indicate that these groups have reached the level of organization of a Party to a non-international armed conflict." para 434

words, as argued by Crawford, the delineating factor that has been employed by practitioners and researchers in differentiating international and non-international armed conflicts is in the simple understanding of the "different context"[325] of their operation. But as stressed by Kress, the nature of contemporary trans-boundary armed conflicts has been noted to differ from these two broad dichotomies in that violent attacks sometimes occur short of the participation of "states on both sides."[326] When this type of conflict takes place, it appears to question the sharp categorisation between international and non-international armed conflicts as it shares similar characteristics of both types – trans-boundary armed conflict and the involvement of non-state armed groups.

Following from this perspective, academic literature on the changing phenomenon of conflict with transnational character is reviewed below. This will help to locate the specific case of Boko Haram armed conflict considering its changing dynamics.

2.4.1 Between International Humanitarian Law and Transnational Armed Conflicts

Some academic scholars held the opinion that the entire body of international law does not cover all armed conflicts and thus cannot be applied to violent conflicts that do not fall within the definitional boundaries of the orthodox conceptual framework of international and non-international armed conflicts. In this category is Richard Baxter, who famously argued that "the first line of defence against international humanitarian law is to deny that it applies at all."[327] To maintain their position, they hold firmly to the strict literary or textual stipulations of the Geneva Conventions of 1949. In line with this reasoning, the law of international armed conflicts is limited toward the regulation of conflicts between two hostile states.

[325]Crawford Emily "Blurring the Lines between International and Non-International Armed Conflicts- the Evolution of Customary International Law Applicable in Internal Armed Conflicts" (2008) 15 *Australian International Law Journal*, 29

[326]Kress, Claus "Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts" (2010) 15(2) *Journal of Conflict and Security Law,* 245

[327]Richard Baxter "*Some Existing problems of International Humanitarian Law*; in *The Concept of International Armed Conflict*: Further outlook, *Proceedings of the International Symposium on Humanitarian Law*(Brussels, 1974) 2

Accordingly, the concept of non-international armed conflict can only be applied toward the regulation of armed conflicts fought within the boundary of a state considering it to be "armed conflict not of an international character."[328] Based on the formulation above, whenever trans-boundary conflicts take place between non-state groups there is insufficient justification for the application of the rules of *jus in bello*.[329]

To this end, Dinstein argues that whenever a State decides to take military actions to counter the threat of a non-state group, particularly within the territorial boundaries of another state, such actions may be termed as "extra-territorial law enforcement."[330] In such situations, Dinstein argues that, the State must not be bound by the rules of humanitarian law as it will be only optional or at best, a choice derived from its policy. This also means that any state undertaking extra-territorial enforcement may chose not to observe the fundamental norms of IHL.[331] No doubt, the position of these scholars can be understood within the purview that the application of the rules of IHL in the circumstances explained above can lead to a situation where insurgent groups (non-state actors) are accorded legitimacy and status. However, these legitimate concerns can lead to a situation where victims of armed conflicts, specifically those who became victims by conflicts that spilled over the territory of other states (such as the case of Boko Haram spilling to neighbouring states) being denied the adequate "protection than those affected by conflicts limited to the territory of only one State."[332]

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[328] Michael N Schmitt *Direct Participation in Hostilities and 21st Century Armed Conflict*, in Hosrt Fischer *Crisis Management and Humanitarian Protection* 523

[329] *Ibid* "The body of humanitarian law including that involving direct participation in hostilities would not be applicable to counterterrorist activities taking place outside the confines of either international or non-international armed conflict. Indeed, States may apply humanitarian law to their activities as a matter of policy, but they are not required to do so as a matter of law."

[330] YoramDinstein, *War, Aggression and Self-Defence* 4th Ed (Cambridge University press, 2005) 244

[331] *Ibid*

[332] Sassòli, Marco. "Transnational armed groups and international humanitarian law." *Program on Humanitarian Policy and Conflict Research, Harvard, Occasional Paper Series* 6 (2006) 9

Furthermore, Schondorf argues "if [it is] not armed conflict, then it is unworkable and artificial – the law simply does not square with reality."[333] The basis on which armed conflicts that are defined as non-international in nature (i.e. within a single state or territory) would suddenly descend into a lacuna simply because of it crossed over to another territory is unimaginable. At the very least, this form of reading of the law may actually refute the fundamental principle of *jus in bello*.[334] After all, the fundamental principle of international humanitarian law is to offer protection to victims of violent conflicts that have the attributes of armed conflicts.[335]Lietzau provides a clearer response to this issue when he notes that "Even if one accepted that the conventional rules of Common Article 3 and Additional Protocol II cannot apply to such situations, at the very least customary humanitarian law would continue to provide protection."[336]

Again, the question posed by Schmitt resonates well; one wonders why a violent conflict that has been measured to be equal to armed conflict as provided for in the rules of *jus in bello*cannot be seen in the same light even when it qualifies as armed conflict simply because it involves a transnational element.[337] The present practice is in direct opposition – the quest to widen the extent of application of humanitarian law by state both state actors and international organisations.

2.5 Internationalized and Transnational Armed Conflicts

The requirements for categorizing conflicts as international or non international as reviewed above are clearly the most basic to apply when the hostility is between two or more countries, or within a country. Also, as discussed above, assuming the threshold requirements are

[333]Roy S. Schondorf, Extra-State Armed Conflicts: Is there a need for a new Legal Regime?" (2004) 37 *New York University Journal of International Law and Politics,* 28
[334]*ibid*
[335]*Ibid*
[336]William K. Lietzau, Combating Terrorism: Law Enforcement or War? In Michael N Schmitt and Gian L Beruto Terrorism and International Law, Challenges and Responses (European Centre for Security Studies, 2003) 80
[337]Michael N Schmitt "21st Century Conflict: Can the Law Survive?" (2007) 8(2) *Melbourne Journal of International Law,* 443

fulfilled, a conflict between the forces of two or more states is characterized as international, while those within a state's territory between the state forces and non-state armed groups are generally characterized as internal armed conflicts.[338] However, recent conflicts have exhibited that such cannot be easily classified: amongst many other possibilities, a conflict may spill across a state's border, as seen in the Boko Haram armed conflict in Nigeria; an armed group might be fighting in one state but based in another; or a government might be overtly or covertly supporting one of the parties in civil war time in another country. A good example in this regard is the armed conflict in the Democratic Republic of Congo (DRC), at one point referred to as "Africa's world war."[339] The conflict has involved state forces from Angola, Rwanda, the DRC, Namibia, Sudan, Uganda and Zimbabwe, together with host of armed groups with different objectives, nationalities, State support and areas of operations.[340]

In some cases where there is transnational element, the conflict could be international or non-international or both. In some instances, there could be an international armed conflict between particular parties to the conflict and non-international between others fighting simultaneously. Or a conflict may change from international to non-international or vice versa in time, as happened in Afghanistan from 2001.[341] This section largely concentrates on conflicts involving state and non-state parties, and especially the legal effect of foreign interference in an internal armed conflict. These circumstances are usually discussed under two main headings, even though the wording is not ever consistent and there is some overlap between the two. The first is 'internationalized' armed conflicts, where an internal armed conflict may change into an international armed conflict through the involvement of another

[338] Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, (Cambridge University Press, 2010) 73
[339]Marta Iniguez De Heredia, *Everyday Resistance, Peace building and State-making: Insights from Africa's World War*, (Manchester University Press, 2017)
[340]*ibid*
[341]Robin Geib and Michael Siegrist, "Has the Armed Conflict in Afghanistan affected the Rules on the Conduct of Hostilities?" (2011) 93(881) *International Review of the Red Cross*, 11

state. The second is 'transnational,' 'extra-state' or 'extra-territorial' armed conflicts, which reflects on the legal effect of internal armed conflict spillover to anothercountry.

This section is particularly relevant to this research because of the dynamic nature of the Boko Haram armed conflict in Nigeria- splitting over to neighboring countries, including links with other terrorist organizations such as Al Qaeda and ISIS. This dynamic nature requires us to examine and locate the position of the law regulating the Boko Haram armed conflict.

2.5.1 Internationalized Armed Conflicts

An internal armed conflict can be internationalized in one of two ways: If (1) a foreign state get involved in that conflict using its forces, or (2) if either party(s) to the conflict act on behalf of that other state.' Both situations are demonstrated below.

2.5.2 Military Intervention by a foreign State in a NIAC

If there is an internal armed conflict between a State and an armed group fighting within a state, for example Nigeria and Boko Haram armed group, fighting within the territory of Nigeria, fulfilling all the conditions of non-international armed conflict- such as intensity and organization, the lingering question is - what is the legal effect of military intervention by another state(s)?

2.5.3 Irrespective of which side the intervening State supports, the conflict becomes IAC

Here, some scholars hold the view, as the ICRC in the past,[342] that whether an external State gets involved in the conflict to assist the territorial State or the armed group, the entire conflict becomes an international armed conflict because an international factor has been included- thus from this point onwards, the conflict is not anymore between a single State and

[342]ICRC, "Protection of Victims of Non-International Armed Conflict," Documents presented at the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 24 May- 12 June, 1971, Vol V, Geneva, 17; Available at: https://www.loc.gov/rr/frd/Military_Law/pdf/RC-conference_Vol-1.pdf (Accessed June 2020)

an armed group, or between armed groups.[343] The judicial precedent of the ICTY is often cited in support of this view, such as *Rajic, Blaskic* and *Kordic*,[344] however, whether these cases support such argument is debatable.[345] Each of them concern the complex conflicts that started in Bosnia and Herzegovina after its declaration of independence in 1992, Croatia's military support of Bosnian Croatian soldiers in their conflict with the Bosnian government forces. Number of observations by the Tribunal are to the effect that any intervention of external troops makes a situation of an internal armed conflict international, for instance in *Blaskic:* "an armed conflict which explodes in the territory of a single State and which is thus at first sight internal may be considered international where the troops of another country intervenes in the conflict…."[346] However, even though the circumstances in Bosnia and Herzegovina were exceptionally complex, with various parting entities declaring statehood and forming their own armed forces at various times, the external intervention in question in each case was in support of the opposing side of the government at the time - not in support of the government side, or of both sides.[347] As demonstrated below, it is generally agreed that external military intervention in support of a non-state party to a conflict renders such conflict international.

2.5.4 In the event that the foreign State assists the territorial State, the conflict remains Non-International

In the event that another State intervenes to assist the territorial State, the general view is that the conflict remains internal in character, based on the fact that there is no conflict between

[343]Dietrich Schindler, "International Humanitarian Law and Internationalized Internal Armed Conflicts" (1982) 22(230) *International Review of the Red Cross,*255
[344]*Prosecutor v. Rajic*, ICTY, IT-95-12-R61, Review of Indictment, 13 September 1996,Paras 10-21; *Prosecutor v. Blaskic*, IT-95-14-T, Judgment, 3 March 2000, Paras, 76, 83-94; *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Judgment 26 February 2001, Paras, 66-7, 79, 108-9
[345]*Supra,* note 295 at 223
[346]Human Rights Watch, "Genocide, War Crimes and Crimes against Humanity: Topical Digests of the Case Law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia," (2004) Listing of Cases included; Available at: https://www.refworld.org/docid/415c04664.html (Accessed July 2020) 51
[347]*Prosecutor v. Rajic*, ICTY, IT-95-12-R61, Review of Indictment, 13 September 1996, para, 11

two or more States but only between a single State assisted by another, and an armed group.[348] However, there is the question of what law would apply, because while Common Article 3 applies to all situations of non-international armed conflicts, Additional protocol II could not possibly apply because based on its literal wording it is limited to conflicts between the armed group and the armed forces of the territorial State (the State on which the conflict is taking place). However, scholars have argued that the words 'its armed forces' in Article 1 of Additional Protocol II should be read widely and extensively as understood to include any State supporting the territorial State.[349] At the very least, the rules of customary international law applicable to non-international armed conflicts would apply.

2.5.5 Where the foreign State assists the armed group, the conflict between such foreign State and the territorial State is international while that between the armed group and the territorial State remains internal

In a situation where an external State intervenes through its troops in an internal armed conflict in support of the armed group, the Appeal Chamber in the *Tadic* case noted that in such situation, there are two parallel conflicts.[350] An internal armed conflict between the territorial State and the armed group, and an international armed conflict between the territorial State and the intervening State.[351] This is also how the ICJ seemed to have examined the situation in the *Nicaragua case*: the conflict between the insurgent *contras* and Nicaragua was internal, whereas the military action between the United States, which was assisting the *contras*, and Nicaragua was categorized as international armed conflict.[352] This suggests that if for example, a foreign country(s) intervenes through its troops in support of Boko Haram armed group in the territory of Nigeria, going by the above analysis, there would be two parallel conflicts in Nigeria: one non-international armed conflict between the

[348]Christopher Phillips, "Syria," in Chatham House, "The Legal Classification of the Armed Conflicts in Syria Yemen and Libya" (2014) 1 *International Law*, 19; *Supra*, note 295 at 222
[349] Sylvain Vite, "Typology of Armed Conflicts in International Humanitarian Law: Legal concepts and actual situations" (2009) 91(873) *International Review of the Red Cross*, 80
[350]*Prosecutor v. Tadic*, ICTY, IT-94-1-A, Appeal Judgment, 15 July 1999, para 84
[351]*ibid*
[352]*Nicaragua v. United States of America* (1986) ICJ Rep, para 219

Nigerian forces and the Boko Haram armed group and an international armed conflict between Nigeria and the foreign State assisting Boko Haram.

2.5.6 Where the external State supports the armed group, the entire conflict becomes international

This is similar to the analysis in (A) above, although is restricted to external military assistance in support of the armed group only, and is a more widely advanced view.

As explained, the views expressed at (B) and (C) are the most generally recognized and accepted at the moment: that external intervention through its troops to support the territorial State does not change the status of a non-international armed conflict, while the support of an insurgents would likely create parallel international and non-international armed conflicts.[353] However, in some cases the opinion at (D) could indeed be most suitable, where for instance the connection between the external State and the armed group is very close that there is effectively one conflict, with the external State and the armed group as one party and the territorial State as the other.[354]

For exhaustiveness, a fifth class of intervention could be discussed: where a country intervenes in a non-international armed conflict between two or more armed groups, to assist one armed group against another. In such a situation, the legal effect is generally determined by the response of the territorial State; if the territorial State consents or acquiesces in the foreign States' activities in its territory, there is no conflict between two opposing States and-if the opinion at (C) above is adopted, the conflict remains non-international in character. But if the territorial State objects the intervention, then within the framework of international law, force is employed in the territory of another State without its consent, even where such force is not aimed at the State itself.[355] However, if the territorial State does not react by military force, then there may be no armed conflict of any sort between the two countries because the

[353] *Prosecutor v. Tadic*, T-94-1-A, Appeal Judgment, 15 July 1999, para 84
[354] *Supra*, note 295 at 224-5
[355] Dieter Fleck, *The Law of Non-International Armed Conflict* (Oxford University Press, 2013)

relevant threshold has not been reached. This is the position held by the ICRC that: an armed conflict arises once there is "resort to armed force between two or more States."[356] However, if the territorial State responds by military force, any subsequent conflict between the two States will clearly be an international armed conflict.[357]

2.5.7 Where either of the parties is acting on behalf of a foreign State

This is the second principal means in which an internal armed conflict can be internationalized through the intervention of another State (the first instance is the direct intervention by the troops of another country as explained above).[358] History has shown that repeatedly, external States have interfered in another State's internal conflicts either directly or indirectly, but the question is: what degree of interference will legally constitute an armed conflict between the foreign country and the territorial country? The question has surfaced in several international cases where the court had to identify the connection between an armed group and a foreign State. This led to difference of opinions between the International Court of Justice and the ICTY, analyzed below.

2.5.8 The *Nicaragua* Case - Effective Control Test

The 1986 *Nicaragua*case[359] stems from the UnitedState's intervention alongside the *contras,* an insurgent group engaged in an armed conflict to overthrow the leftist Sandinista government in Nicaragua in the early 1980s. Nicaragua filed an action against the United States in the ICJ, accusing the United States of violating international law in several ways, including by employing the use of force against Nicaragua openly and covertly through the *contras.* Nicaragua also claimed that the United State be held accountable in international law for the violations of international humanitarian law rules reportedly committed by the

[356] ICRC, "How is the term Armed Conflict Defined in International Humanitarian Law?" Available at: https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf (Accessed July, 2020) 5
[357] *Prosecutor v Tadic*, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Para 70 (*hereinafter Tadic Jurisdiction Appeal*)
[358] *Tadic* Appeal Judgment, Para 84
[359] Military and Paramilitary Activities in and against (*Nicaragua v. United States of America),* Merits, Judgment, (1986) ICJ Report, para 106

insurgent *contras*.[360] It further claimed that the link between the United States and the *Contras* was close that the activities of the *contras* were fundamentally the activities of the US.[361] In analyzing Nicaragua's allegations, the Court observed that the United States had encouraged and assisted the *contras* in the past years in several ways:[362]

Even though the Court found that there was no 'direct and crucial combat assistance' provided to the *contras,* it did find that the *contras* were to a 'large extent financed, trained, equipped, armed and organized' by the United States.[363] In reviewing whether in general, the *contras* could be viewed as an organ of the United States government, for the purposes of the law of State responsibility,[364] the Court observed otherwise:

> …despite the heavy subsidies and other support provided to them by the US, there is no clear evidence of the US having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.[365]

The Court agreed that the United States obviously exercised some control over the contras, however, the issue was the degree of that control, and this was essential to assert that the United States was responsible for the contras' alleged breaches of IHL.[366] The Court put in place a very high threshold for this.[367]

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[360]*Ibid,* paras, 113-5
[361]*Ibid,* para, 114
[362]*Ibid,* para 106… It is the Court's opinion that the assistance of the US authorities for the acts of the contras took various patterns over the years, such as logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage, etc. The Court considers it clear that several military and paramilitary operations by this force were decided and planned, if not actually by US advisers, then at least in close collaboration with them, and on the basis of intelligence and logistic support which the United States was able to offer, particularly the supply aircraft provided to the contras by the US…
[363]*Ibid,* para 108
[364]International Law Commission on Responsibility of States for Internationally Wrongful Acts, 2001, Article 4
[365]*Supra, Nicaragua,* para 109
[366]*Ibid,* para 110-13
[367]*Ibid,* para115All the ways of US's involvement earlier mentioned, as well as the general control by the United States including force with extreme degree of dependency on it, would not per se mean, without additional proof, that the US instructed or effectuated the commission of offences violating human rights and humanitarian law as claimed by Nicaragua. Such acts could certainly be committed by the contras without the control of the United States. For this action to lead to legal responsibility of the US, as a matter of law have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged breaches were committed…

Based on the evidence before it, the Court was not convinced that such effective control was used by the United States.[368] However, the 'effective control' test was overlooked by the ICTY in 1995 in the *Tadic* case, examined below.

2.5.9 The *Tadic* Case - Overall Control Test

The extent of control became an issue in the *Tadic*case because the allegations against *Tadic*included serious violations of the Geneva Conventions where, crucially, the victims of the crimes were individuals 'in the custody of a party to the conflict … that are not citizens.'[369] The victims were Bosnians held by the Bosnian Serb forces (VRS), and thus evidently excluded from the above provision. However, if the VRS could be compared in some legal way to the forces of another country-Serbia and Montenegro (FRY), the confrontation would be considered international and the charges could stand. The ICTY Appeals Chamber in 1999 examined the level of control that would have to be employed by a country over a military troop for this to occur, and found that:

> In order to assign the activities of a military or paramilitary group to a country, it must be proved that the country wields overall control over the group, not only by equipping and financing the group, but also by coordinating or assisting in the general planning of its military activity.[370]

The Court clearly stated that this test, which it summed up briefly as "generally to regulate or assist in planning the military group's activities,[371] was less strict than the ICJ's 'effective control' test:[372]

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[368]*Ibid*, para, 115,
[369]*Prosecutor v. Tadic*, Trial Judgment, para, 578
[370]*Tadic* Appeal Judgment, para 131
[371]*Ibid*, para 138
[372]*Ibid* ... Control by a State over subsidiary armed forces or militias or paramilitary units may be of an overall character (and must compromise more than the mere provision of financial support or military equipment or training). This condition, however, does not go so far to include the issuing of particular orders by the State, or its direction of each individual action. Under international law it is in no way necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military actions and any alleged breach of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the party to the conflict) has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts Para 137; see also para 145

The Appeals Chamber was convinced with the evidence presented before it that 'the (VRS) were to be considered as operating under the overall control of and in the interest of the FRY. Consequently, the hostility in Bosnia and Herzegovina between the Bosnian Serbs and the central government of Bosnia and Herzegovina should be characterized as an international armed conflict.[373] Therefore, while the ICJ effective control test demanded the external State to be in a reasonably direct control of each operations, the ICTY overall control test required only on a general role in planning and organizing the group's activities.

The ICJ got the chance to reply to the *Tadic*decision in 2007 in the Bosnian Genocide case. In that case,[374] the issue was similar- the link between the VRS and FRY- but with the aim of identifying whether the genocide conducted by the VRS at Srebrenica in 1995 could be attributed to the FRY, the defendant in that case.[375] This also turned on the degree of control employed, and the Court took as its basis the customary rule of state responsibility as enshrined in Article 8 of the International Law Commission's articles on state responsibility, relating to conduct ordered or carried out by a State.[376] The Court reaffirmed its 'effective control' test from *Nicaragua,* and refused the *Tadic* rationale, on the basis that while the 'overall control' test might be suitable in the framework of determining whether or not an armed conflict is international, it was clearly not appropriate for determining concerns of State responsibility.[377] The Court therefore, applied its "settled jurisprudence" on state responsibility and ruled that the FRY did not use effective control over the activities in the context of which the genocide was committed; 'the resolution to kill the adult male

[373]*Ibid*, para 162
[374]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia and Montenegro)*, Judgment, (2007) ICJ Rep. p 43 (*Bosnian Genocide Case*)
[375]*Ibid*, paras 297, 376
[376]Article 8, ILC Articles on State Responsibility, 2001
[377]*Bosnian Genocide Case*, para, 404

population of the Muslim community in Srebrenica was decided by some members of the VRS main staff, but without orders from or effective control by the FRY.'[378]

However, the ICTY has retained the correctness of its 'overall control' test, and has employed it in various cases since *Tadic*;[379] it has also been adopted by the International Criminal Court in the *Lubanga* case for a similar reason- ascertaining whether or not an armed conflict is international.[380] Since then, it is increasingly recognized that the overall control test is in fact appropriate for this purpose. Also, the ICJ itself has observed that there is no rational explanation as to why the test should be the same for both issues that are significantly different: one is evaluating the international character of a conflict, while the other is ascertaining whether a State is responsible for a particular act committed in that conflict.[381] However, the ICJ has stressed that the overall control test was not right for the latter purpose, given that this would overly widen the scope of State responsibility, the main principle of which is that a State should only be responsible for its own actions.[382]

2.5.10 Transnational - Armed Conflicts

Beside an armed conflict becoming internationalized because of external intervention, as explained above, complexities may occur when an internal armed conflict involves the territory of one or more countries. The various ways in which this may arise are examined below. It is important to bear in mind the relevant phrases of Common Article 3 and Additional Protocol II setting out their application:

[378] *Ibid*, paras, 407, 413
[379] See for example, *Prosecutor v. Delalic et al.*, IT-96-21 (Appeals Chamber), 20 February 2001, para, 26; *Prosecutor v. Aleksovski*, IT-95-14/1 (Appeals Chamber), 24 March 2000, paras, 134, 145
[380] *Prosecutor v. Thomas LubangaDyilo*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, (Dyilo Decision), paras, 210-11
[381] *Bosnian Genocide Case*, para, 404-5
[382] *Ibid*, para, 406

Common Article 3 applies to non-international armed conflicts "occurring in the territory of one of the High Contracting Parties," without further condition currently relevant.[383]

Additional Protocol II applies to non-international armed conflicts with several conditions:

- "which takes place in the territory of a High Contracting Party;"

-"between (that State's) armed forces and (organized armed groups) etc;"

-"(the group must) exercise… control over a part of (that State's) territory…"[384]

The formulation of Common Article 3 does not seem to obligate that the conflict must take place on, or only on, the territory of the State party to the conflict. While that of Additional Protocol II, however, read literally, requires that:

… the conflict occur on the territory of the State party to the conflict; that State must be a party to the Protocol; and the armed group must have control of territory in that State.

Therefore, Additional Protocol II would easily apply to situations where the conflict occurs wholly within the boundaries of a State party to the Protocol without any interference by an external State; however, such as the case of Boko Haram, recent internal armed conflicts are very complex with foreign countries getting involved in internal conflicts and armed groups spread across borders. The following hypothetical examples are some of the complexities that occur in practice; it would be seen that in several instances the law is not settled and that there are diverse views in terms of what the law is and ought to be. In each instance, country **A** is in military confrontation with armed group **Z**, and it is assumed that armed group Z is not subject to the control of any foreign country because as explained in section 1 above, control by a foreign country could render the conflict international, and likewise, no actual military confrontation between States, because this will as well make the conflict an international armed conflict.

[383] *Supra*, note 295 at 230
[384] Article 1(1) Additional Protocol II

2.5.11 Hostilities between Country A and armed group Z based in Country A and fighting in Country A

This is the easiest type of non-international armed conflict, mentioned here for exhaustiveness and as a reference point. This comprises a classic armed conflict that is entirely within the territory of Country A. The law that applies in this type of conflict is Common Article 3 and customary international law, and if Country A were party to Additional Protocol II and armed group Z has fulfilled the conditions of territorial control, then Additional Protocol II would also apply.

2.5.12 Hostilities between Country A and armed group Z based in Country B, fighting in Country A

This is somewhat slightly different type of non-international armed conflict from the one noted above. Here, the hostility is between Country A and armed group X and the confrontations occurs in country A, but armed group Z bases in neighboring country B, for instance around the border area- for example, Boko Haram basing in Nigeria and engaging the forces of the neighboring countries. From this place in country B, group Z crosses into country A and confronts the armed forces of country A there. Notwithstanding the crossing of State border by armed group Z, the general view here is that this is still a NIAC because internal armed conflicts are distinguished by the parties involved and not the geographical location of the conflict.[385]

In addition, Articles 1 and 7 of the International Criminal Tribunal for Rwanda, extend the jurisdiction of that Court- required enforcing, inter-alia, the law of NIAC, to the neighboring countries. MarcoSassoli also argued that it really does not matter that group Z operates from across the territory of country B because the hostility is still restricted to

[385]LiesbethZegveld, *Accountability of Armed Opposition Groups in International Law*, (Cambridge University Press, 2002) 136

country A – for instance, Nigeria in this study.[386] For example, in the early 2000s, the FARC troops were stationed at the Colombia/Ecuador territory, and the Colombian soldiers crossed the border into Ecuadorian territory to engage the FARC troops that are based there. Likewise, the Lord's Resistance Army (LRA) had a base in South Sudan and would cross the border into Uganda to launch attacks. Years earlier, during the Algerian war of independence, the Armee de Liberation Nationale (ARL) had stations in Tunisia, where they launch attacks against French soldiers in Algeria.[387] In spite of the cross-border elements of those conflicts, the non-international character of the Colombia/FARC war or the Uganda/LRA war is not really challenged.[388]

2.5.13 Hostilities between Country A and armed group Z, fighting in A spills across border into Country B or even more

The confrontation between country A and armed group Z might possibly spill into neighboring country B, or could probably have a base in country B and followed there by country A. Here, in view of the fact that the conflict has crossed an international border, such type of conflict have been classified as 'transnational' or 'extraterritorial' non-international armed conflict.[389] However, there are several opinions regarding the legal consequences.

First, Dietrich Schindler observed that the consequences largely depends on the nature of country A's military activity in country B: if its actions are restricted to confronting armed group Z and its structures only, then the conflict shall remain non international in character because there is no military confrontation between countries A and B.[390] But where country

[386]Marco Sassoli, "Transnational Armed Groups and International Humanitarian Law" (2006) 6(9) *Harvard University Program on Humanitarian Policy and Conflict Research, Occasional Paper Series*, at 7-9
[387]Francoise Perret and Francoise Bugnion "Between Insurgents and Government: The International Red Committee of the Red Cross's action in the Algerian War (1954-1962) (2012) 93 (883) I*nternational Review of the Red Cross*, 707; Richard A Falk, *The International Law of Civil War* (John Hopkins Press, 1971) 206
[388]Roy S Schondorf "Extra-State Armed Conflicts: Is there a Need for a New Legal Regime?" (2004) 37 *New York University Journal of Law and Politics*, 9
[389] Sylvain Vite, "Typology of Armed Conflicts in International Humanitarian Law: Legal concepts and actual situations" (2009) 91(873) *International Review of the Red Cross*, 89
[390] Dietrich Schindler "The Different Types of Armed Conflict According to the Geneva Conventions and Protocols," (1979) 163 *Collected Courses of the Hague Academy of International Law*, 131

A's attacks are against country B's military structures, the entire war becomes an international armed conflict because now there is a conflict between two States.[391]

The second opinion is identical, but turns on whether country B has consented to, or at the very least agrees country A's military operations in its territory. If it has, then the character of the conflict remains non-international for the same reason explained in the preceding paragraph that there is no hostility between the two countries. However, if country B denies its consent, then the situation is that there are two parallel armed conflicts: an internal armed conflict between Country A and group Z, and an international armed conflict between countries A and B.[392] This is the view expressed by the ICRC in the conflict between Israel and Hezbollah in 2006: that there exist a non-international armed conflict between Israel and Hezbollah, who were operating from Lebanon, and an international armed conflict between Israel and Lebanon.[393]

In all cases, if the hostility is regarded as non-international, the fact that it is not geographically restricted to a particular country is largely found to be unnecessary, regardless of the phrases set out in Common Article 3 and Additional Protocol II noted above. Legal scholars have admitted that this wording seems to restrict an NIAC to the territory of a particular country, but noted that this would be a wrong interpretation; what is significant, they argue, is not the territorial factor but rather the character of the parties to the conflict.[394] There are several examples of internal armed conflicts spilling over territorial borders including the case of Boko Haram armed conflict in Nigeria spilling over to neighboring countries of Chad, Cameroon, Niger and Benin, and engage their forces. However, based on

[391]*Prosecutor v Tadic*, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Para 70 (*hereinafter Tadic Jurisdiction Appeal*); See also Common Article 2 to the 1949 Geneva Conventions-'Shall apply to all situations of declared war or any other armed conflict which may arise between two or more of the High Contracting parties, even if the state of war is not recognized by one of them.'
[392]*Supra*, note 295 at 231
[393]ICRC Report, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts," Geneva, October 2011; Available at:https://e-brief.icrc.org/wp-content/uploads/2016/08/4-international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts.pdf (Accessed May 2020) 10
[394]*Supra*, note 385 at 136; *Supra,* note 295 at 232

the foregone analysis, one can argue that the spilling over of the group does not change the status quo of the conflict as non-international armed conflict, because all the countries involved have supported by the African Union Peace and Security Council (PSC) jointly signed an agreement to fight the group together.[395] A recent example is that of Islamic State in Iraq and the Levant (ISIL) which has since 2013 also taken control of vast territory in Syria and Iraq.[396] Another example that is often cited is the activity of the FARC against Columbia where the NIAC character of the conflict is generally agreed.[397]

Accordingly, the rules of Common Article 3 and customary international law would apply.[398] With regards to Additional Protocol II, scholars have argued that provided certain aspect of the conflict occurs in country A (and supposing A is a party to the Protocol), then it should equally apply to that part of the conflict in country B. That where the Protocol is applicable to one party to the conflict, it equally applies to all.[399]

The third opinion observed is the situation where the conflict between country A and armed group Z does not squarely fit into either categories of armed conflicts i.e. international or non-international. The conflict is not international because it is not between two countries and neither could it be non-international because another country and its territory are involved. Advocates of this opinion argue that another type of armed conflict should be developed and that rules should be drafted exclusively for such situations.[400]However, Marco Sassolicriticised the quest to name an entirely new category of armed conflict and stated that "a third type of armed conflict would add to the existing objective challenges in categorizing

[395] Camillo Casola "Multi National Joint Task Force: Security Cooperation in the Lake Chad Basin," Available at: https://www.ispionline.it/en/pubblicazione/multinational-joint-task-force-security-cooperation-lake-chad-basin-25448 (Accessed May 2020)
[396] *Supra*, note 295 at 230
[397] *ibid*
[398] *Supra*, note 393 at 9-10
[399] *Supra*, note 295 at 231
[400] Sylvain Vite, "Typology of Armed Conflicts in International Humanitarian Law: Legal concepts and actual situations" (2009) 91(873) *International Review of the Red Cross*, 89; Geoffrey S Corn, "Hamdan, Lebanon, and the Regulation of Armed Conflict: The Need to Recognize a Hybrid Category of Armed Conflict" (2007) 40 *Vanderbilt Journal of Transnational Law*, 295

circumstances under humanitarian law and involve the chance that States faced with the other two types invoke the existence of the new third category, especially if, as one may fear, the latter provides limited protection to the enemy."[401]

2.5.14 Hostilities between Country A and armed group Z based in neighboring Country B, fighting in B only

The major difference between this and the preceding review is that there is no conflict occurring in country A at all and there is no spillover or spread of an ongoing hostility. Regarding the conflict between country A and armed group Z, some have argued that since the character of the conflict would be non-international if the conflict is shifted to the territory of country A (on the same reasoning as explained in (iii above), then there is no rational explanation for not categorizing it as non-international while in country B. However, there is still the issue of territory at least for the potential application of Additional Protocol II. This is because it is difficult to comprehend on how Additional Protocol II could apply to any part of the conflict, even if both countries A and B are parties to the Protocol. The conflict is going on within the territory of B, but not between "its" armed forces and armed group Z. On the contrary, the conflict is between armed group Z and country A's forces, but not the territory of country A.

2.5.15 Global War on Terror: Hostilities between Country A and armed group Z based in Country C and other places, fighting in different Countries

This is the most complex analysis of the above reviews. In this case, a country is involved in a conflict with an armed group that has several foreign bases while the conflict is going on in different countries. This is essentially relevant within the framework of international terrorism and the US- led declared 'war on terror' mainly against, Al Qaeda.[402]

[401] *Supra*, note 386 at 25

[402] Laurie R Blank and Benjamin R Farley "Identifying the Start of Conflict: Conflict Recognition, Operational Realities and Accountability in the Post-9/11 World" (2015) 36(3) *Michigan Journal of International Law*, 467

Al Qaeda is a loose network of radical fanatics that was declared a terrorist organization by the United Nations and other international bodies.[403] It operates, or has associates, in several countries, and since the 1990s, it has been liable for many serious terrorist attacks around the world, most terribly those in USA on 11 September 2001.[404] In 2002, the US started to refer 'war on terror' against Al Qaeda.[405] Since then, it has on different occasions categorized this as an armed conflict that was neither international nor non-international; a non-international armed conflict, or just put it as a global armed conflict without identifying its nature.[406] However, the US Supreme Court in its 2006 decision in *Hamdan v. Rumsfeld*[407] considered it as a non-international armed conflict, fundamentally because it was not an armed conflict between States.

There are several arguments on the legal status of the continuing hostility between Al Qaeda and its associates on one hand, and the US and its allies, on the other. Two crucial questions were raised: first, whether Al Qaeda is an armed group, and secondly, whether its actions qualify as an armed conflict. One of the challenges in reaching a sound decision is the blurry and switching nature of the organization, as well as the absence of credible evidence on the correct relationship between the diverse branches that every now and then come out and claim to be affiliates of Al Qaeda.[408] Like always, much depends on the true events. Thus, SandeshSivakumaran argued that if the United States is right and there is single global armed conflict between the United States and Al Qaeda, then the numerous assaults and adverse reactions in various places could be combined to determine whether the intensity requirement for the qualification of an armed conflict is fulfilled.[409]

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[403] *Ibid*, at 487
[404] *ibid*
[405] Avril McDonald, "Declarations of War and Belligerent Parties: International Law Governing Hostilities between States and Transnational Terrorist Networks" (2007) 54 *Netherlands International Law Review*, 279
[406] *Supra*, note 295 at 232
[407] *Hamdan v. Rumsfeld* 548 US 557(2006), 630
[408] See generally, US National Strategy for Counter-terrorism, June 2011; Available at:https://obamawhitehouse.archives.gov/sites/default/files/counterterrorism_strategy.pdf (Accessed May 2020)
[409] *Supra*, note 295 at 233

The majority of opinion, however, is that there is legally no such thing as global war on terror, or global armed conflict, except a variety of split situations, all of which has to be examined independently.[410] On this ground, the ICRC noted that 'the war on terror is a phrase used to depict variety of measures and operations aimed at avoiding and combating more terrorist attacks. These measures could include "armed conflict."[411] Therefore, the 2001 US-led assaults on Al Qaeda and the Taliban, the then de facto government of Afghanistan, was an international armed conflict;[412] after the Taliban de facto government was toppled and defeated, the continuing hostilities with Al Qaeda turned to non-international armed conflict.[413] The US-led attacks on Al Qaeda locations along the border areas of Pakistan could be considered as an overspill of that non-international armed conflict.[414] However, other cases cannot be considered as armed conflicts but acts of terrorism only. This is the position of the United Kingdom (and many others) in its reservation when ratifying Additional Protocol I in 1998, noting that the term armed conflict of itself and in its context means a sort of situations that is not constituted by the commission of ordinary crimes including terrorist acts whether concerted or in isolation.[415] Similarly, the ICRC has questioned 'whether these groups and networks can be characterized as party to any type of armed conflict, including transnational.'[416]

Even though some situations are recognized as non-international armed conflicts or terrorist acts, at either end of the spectrum, in the centre is a growing number of cases of conflicts between the United States and its allies, and Al Qaeda and its associates in places

[410]JelenaPejic, "Terrorist Acts and Groups: A Role for International Law?" (2004) 75 *British Yearbook of International Law,* 85
[411]ICRC, "Terrorism, Counter-terrorism and International Humanitarian Law" 17 October 2016, Available at: https://www.icrc.org/en/document/terrorism-counter-terrorism-and-international-humanitarian-law (Accessed May 2020)
[412]*Supra*, note 393 at 10
[413]*Supra*, note 295 at 233
[414]*ibid*
[415]Additional Protocol I, Reservations, United Kingdom of Great Britain and Northern Ireland, Available at: https://international-review.icrc.org/sites/default/files/S0020860400090884a.pdf (Accessed May 2020)
[416]ICRC, "International Humanitarian Law and Terrorism: Questions and Answers." Available at:https://www.icrc.org/en/doc/resources/documents/faq/terrorism-faq-050504.htm (Accessed May 2020)

such as Yemen, Somalia, Syria etc. There is no geographical link between these countries and the United States, which raise the question of whether these types of conflicts can truly be 'non international.' To answer this, many scholars including SandeshSivakumaran, however, argued that there is no difference in principle between this case and the review in (iv) above- whether the place of the conflict is a neighboring country or on the other side of the world from the State party to the conflict, they argued that what is important is the nature of the parties involved in the conflict and not the geographical location.[417]

2.5.16 The Application of International Humanitarian Law in Transnational Armed Conflicts

Based on the above critical analysis, and from the body of existing literatures on the subject of transnational armed conflicts, it can be argued that the available rules governing IHL can be administered to resolve the complex nature of this type of conflict. The basic reading of this form of conflict is that transnational conflicts can also be regarded as non-international armed conflicts. This is so because in international law, the territorial border is not much important factor as the identity of the parties involved in the conflict.[418] Following this fundamental understanding, once the hostility does not involve State parties – or is between the armed forces of States, or between insurgent groups that have been proven to be under the effective control of a State, then such can be said to be a non-international armed conflict, especially when the intensity of such conflict measured up to armed conflict.[419]

Yet, available literature also point to the fact that both types of conflicts (international and non-international) can take place at the same time in a parallel form. This follows that a state can intervene in civil war against the insurgent group in the territory of another state and

[417] *Supra,* note 295 at 234; Michael Schmitt "Charting the Legal Geography of Non-International Armed Conflict" (2014) 90 *International Law Studies*, 6; *Supra,* note 385 at 136

[418] Orna Ben-Naftali and Keren Michaeli, Public Committee against Torture in Israel v. Government of Israel" (2007) 101 *American Journal of International Law*, 463

[419] See generally the 2016 ICRC Commentary, paras: 402-5

such can still be regarded as non-international armed conflict.[420] But when it intervenes against the forces of another state, or intervenes without the consent of the territorial state, it qualifies it as an international armed conflict.[421] In a scenario where both factors explained above take place at the same time then both types of armed conflicts (international and non-international) can be said to exist – parallel."[422]

Under the definitive framework of transnational armed conflicts, the consent of a given state regarding intervention is of less importance in the characterization of the conflict. However, consent is the most important factor in determining occupation. For instance, if a given state without seeking consent occupied and exercised authority over a section of another country, then such scenario automatically qualifies as international armed conflict even where there are no hostilities within the meaning of Common Article 2.[423] There may be a situation where the intervening state may be said to be engaged in both international armed conflict (with the state in which it occupied its territory) and non-international armed conflict (with the insurgent groups of the state in which it intervenes).[424]

However, it has become increasingly clear that basic rules of war as provided under customary international law are not too different whatever the classification of the

[420]DapoAkande "Classification of Armed Conflicts: Relevant Legal Concepts" in Elizabeth Wilmshurt*International Humanitarian Law and the Classification of Conflicts* Ed (Oxford University Press, 2012)

[421]Rogier Bartels "Transnational Armed Conflict: Does it exist? In Stephane Kolanowski Proceedings of the Bruges Colloquium: *Scope of Application of International Humanitarian Law* (College of Europe/ICRC 2013) 114

[422]ICRC 2016 Commentary, Para 477

[423]This position was reaffirmed by the International Court of Justice in *Armed Activities on the Territory of the Congo*, where the Court applied the law governing international armed conflict to the military activities carried out by Uganda in the Democratic Republic of the Congo outside the parts of the DRC it occupied. See Judgment, 2005, paras 108-208

[424]ICRC 2016 Commentary- Article 2: Application of the Convention at Para 264"... In such a case two conflicts exist in parallel: an international Armed conflict between the attacking state and the territorial state alongside, a non-international armed conflict between the attacking
State and the Organised armed group

conflict.[425]This has been made clear in Article 75 of the Additional Protocol I where the parties to any form of conflict are oblige to apply basic rules of humane treatment.[426]

Following from the above view on the application of the rules of IHL to transnational armed conflict, a review of two case studies – Polisario Front and Boko Haram would help to explain the degree of practicability of this legal framework to our study.

2.6 Case Studies

As a means of juxtaposing the contemplated legal framework with reality, the following section will examine two contemporary conflicts where both transnational element and international are present.

2.6.1 The Polisario Front

Morocco has been occupying Western Sahara since 1975. Morocco is resisted by the Frente Popular para la Liberacion de Seguia el Hamra y de Rio de Oro (Polisario Front), a national liberation campaign birthed in 1973, and acknowledged as representing the people of Western Sahara by the UN in 1979.[427]In pursuit of self-determination for the people of Western Sahara, the Polisario Front set up the Sahrawi Arab Democratic Republic (SADR) in 1976.[428] However, the issue of whether or not the SADR is a State as established by international law is still contentious.[429] Morocco controls two-thirds of the area while the Polisario Front controls the rest of the area. In 1991, the UNSC under Resolution 690 set up

[425]Michael J. Matheson "The United States position on the relation of Customary International Law to the1977 Protocols Additional to the 1949 Geneva Conventions" (1987) 2 *American University Journal of International Law and Policy*, at 427-428

[426]Article 75 Additional Protocol I 1977:"In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons."

[427]UNGA Res 34/37, 21 November 1979

[428]Epstein, Pamela "Behind Closed Doors: Autonomous Colonization in Post United Nations Era-The Case for Western Sahara" (2009) 15(1) *Annual Survey of International and Comparative Law*, 107

[429]Mohammed Daadaoui "The Western Sahara Conflict: Towards a Constructive approach to Self-Determination" (2008) 13(2) *The Journal of North African Studies*, 143; See above section on our classification of international armed conflicts.

the United Nation Mission for the Referendum in Western Sahara in order to monitor the post-conflict situation, including end to hostilities and cutback of military personnel on the territory, and to foster a freely-held referendum on the fate of the province.[430]

2.6.2 Military Occupation of Western Sahara by Morocco

Until when the process of colonial emancipation began in the 1960s, the Western Sahara province was a Spanish protectorate called the Spanish Sahara.[431] After enlisting the province on the inventory of Non-Self Governing Territories under Chapter XI of the UN Charter, the UNGA have repeatedly affirmed in a number of resolutions[432] that the people of Western Sahara have the right for self-determination in accordance with UNGA resolution 1514 (XV).[433] In November 1975, Spain, Morocco and Mauritania signed the Madrid Accords, outlining the eventual withdrawal of the Spanish colonial government from Spanish Sahara, as well as splitting the administration of the province between Morocco and Mauritania. However, the Madrid Accords could not handover sovereignty over the territory of Western Sahara to Morocco. This is because, as the ruling colonial authority, Spain itself does not enjoy sovereignty over the territory thus, could not have singlehandedly handover sovereignty to Morocco and Mauritania.[434]

Supported by Algeria, the Polisario Front began what turned to be a 16-year revolutionary battlein opposition to the presence of Mauritanian and Moroccan soldiers. Following the withdrawal of Mauritania from the conflict in 1979, Morocco annexed the area

[430]UNSC Res 690 (1991), 29 April 1991
[431]David Seddon "Polisario and the Struggle for the Western Sahara: Recent Developments, 1987- 1989" (1989) 45 *Review of African Political Economy*, 132
[432] See for example, United Nations General Assembly Resolution 2072 (XX), 16 December 1965- Question of Ifni and Spanish Sahara; UNGA Res 2229 (XXI), 20 December 1966; UNGA Res 2354 (XXII), 19 December 1967; UNGA Res (XXIII), 18 December 1968
[433]UNGA Res 1514 (XV), 14 December 1960
[434]Letter Dated 29 January 2002 from Under-Secretary- General for Legal Affairs, the Legal Counsel, Addressed to the President of the Security Council, UN Doc S/2002/161, 12 February 2002, SS 4-5; See also, the ICJ, *Western Sahara*, Advisory Opinion, 16 October 1975, p162

that was initially allocated to Mauritania.[435] Soon after, in UNGA resolution 34/37, the UN lamented on the continued occupation of Western Sahara by Morocco; calling on Morocco to cease the occupation, and recommended to include the Polisaria Front- the representative of the people of Western Sahara in seeking a solution.[436] In September 1991, a ceasefire agreement was signed between the government of Morocco and the Polisario Front, effectively ending the 16-year of active hostilities but the occupation continues.[437] The conflict is now stalled, even though there is still underlying tension because both parties control different parts of the territory, with no foreseeable resolution. In February 2017, Morocco declared that it would pull out its forces from the United Nations buffer zone in order to reduce the military pressure in the region.[438]

In 1991, the UNSC 690 created the United Nation Mission for the Referendum in Western Sahara to support the referendum on the fate of Western Sahara.[439] Since then, the directive has been reiterated severally; the most recent is the 2018 Security Council Resolution 2440 which approves six months extension of MINURSO until April, 30th 2019, asking both parties to the conflict to engage in a meaningful dialogue during the scheduled discussion at the end of 2018 to figure out a fair, lasting and mutually agreeable solution that will envisage the possibility for the autonomy of the people of Western Sahara.[440] For the first time in six years, on the 5th and 6th of December 2018, in accordance with UNSC Resolution 2440, an initial panel session was held between stakeholders from Morocco,

[435]Farouk A Sankari "The Western Sahara Conflict: Factors Contributing to the inevitability of a Settlement" (1990) 7(1) *Journal of Third World Studies*, 153
[436]UNGA Res 34/37, 21 November 1979
[437]Edith M Lederer "UN Documents says Morocco violated Western Sahara Cease-fire" (2016), Available at:https://apnews.com/e8085398ed0644848a41e4fb8bbe6691/un-document-says-morocco-violated-western-sahara-cease-fire (Accessed February 2020)
[438]BBC, "Western Sahara: Morocco to Pull out of UN Buffer Zone," Available at:https://www.bbc.com/news/world-africa-39103401. (Accessed February 2020)
[439]UN Security Council, Security Council Resolution 690 (1991) [Western Sahara], Available at:http://unscr.com/en/resolutions/690 (Accessed February 2020)
[440]UN Security Council adopts Resolution 2440 (2018), Authorizing Six-Month Extension for United Nations Mission for Referendum in Western Sahara," Available at:https://www.un.org/press/en/2018/sc13561.doc.htm (Accessed February 2020)

Algeria, Mauritania and the FrentePolisario, led by the Personal Envoy of the Secretary-General for Western Sahara, Horst Kohler.[441] Following the end of the initial session, the UN envoy indicated that more discussions are arranged for early 2019 and that it is expected that the outcome of the discussion(s) will be positive.[442]

2.6.3 The Polisario Front's Deposition to apply the Geneva Conventions and AP I

In June 2015, the Polasario Front deposited a unilateral declaration under Article 96(3) AP I to the 1949 Geneva Conventions with the Swiss federal government. Pursuant to this declaration, Polisario Front has committed itself to apply the Geneva Conventions and Additional Protocol I in its war with Morocco. The Swiss federal government - the depository for the Geneva Conventions and its Additional Protocols, acknowledged the declaration and informed other state parties of the new development. This declaration can only be made by an authority on behalf of its people involved in a conflict covered by Article 1(4) Additional Protocol I. Its approval unquestioningly recognizes that the conflict situation between the Polisario Front and Morocco falls within the purview of Article 1(4) AP I, that is, an armed conflict in which peoples are fighting against colonial domination, alien occupation or racist regimes.

2.6.4 Statehood of the Sahrawi Arab Democratic Republic

In February 1976, the PolisarioFront declared the formation of the Sahrawi Arab Democratic Republic (SADR). However, whereas the right to self-determination of the people of Western Sahara has been recognized,[443] the statehood of the SADR remains a contentious issue. Anthony Pazzanita argued that a persuasive case for regarding SADR a State since it has substantially fulfilled each of the requirements set out in Article 1 of the

[441] *ibid*
[442] UN Envoy on Western Sahara: A Peaceful Solution to Conflict is possible, Available at:https://news.un.org/en/story/2018/12/1027831 (Accessed January 2020)
[443] ICJ, *Western Sahara*, Advisory Opinion, 16 October 1975, Para 162; *Council of the European Union v. Front Populaire pour la Liberation de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario),* C-104/16 P, Judgment, 21 December 2016, Para 92

MontevedeoConvention on the Rights and Duties of States.[444] The SADR has gained recognition from several countries however; some have either withdrawn or frozen recognition. General international law assesses whether an entity possesses statehood. It is still a debated issue of whether recognition is a criterion. Talmon noted that recognition by the international community could be decisive in some situations.[445] The ICRC expressed that effectiveness also determines who represents the state. That is, the capacity to exercise state responsibilities both internal and external, such as administration of state institutions as well as control over a territory are used to evaluate the effectiveness of a government.[446] Although the SADR does not have observer status with the United Nations, it became a member of the Organization of African Unity (OAU), at present the African Union, in 1984.[447] Opposing the entry of SADR to the AU, Morocco withdrew from the organization on the 12 of November 1984.[448] However, in January 2017, after about 33 years of leaving the organization, Morocco got reinstated as a member of the African Union.[449] However, the re-entry of Morocco to the AU does not affect the classification of the conflict.[450]

2.6.5 The Position of Polisario and Morocco and the views of the International Community

While Morocco is still insisting to have sovereign right over the territory of the region, the ICJ dismissed its claim stating that it does not have legal ties of territorial sovereignty on

[444] Anthony G Pazzanita, "Legal aspects of Membership in the Organization of African Union: The Case of the Western Sahara" (1985) 17(1) Journal of International Law, p 123; Article 1 of the Montevieo Convention on the Rights and Duties of States, 1933 listed the following qualifications as condition for a Statehood: (a) a permanent population, (b) a defined territory, (c) government; and (d) capacity to enter into relations with other States.

[445] Stefan Talmon, "Who is a Legitimate Government in Exile?" Towards Normative Criteria for Governmental Legitimacy in International Law, in Guy Goodwin and Stefan Talmon, *The Reality of International Law: Essays in Honor of Ian Brownlie* (Oxford University Press, 1999) 499-537

[446] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention, 12 August 1949: ICRC Commentary of 2016, Article 2: Application of the Convention, Paras 234- 235

[447] Jennifer Labella, "The Western Sahara Conflict: A Case Study of U.N Peacekeeping in the Post Cold War" (2003) 29(2) *Journal of African Studies*, 68

[448] *Ibid*

[449] Morocco rejoins African Union after more than 30 years, Available at: https://www.theguardian.com/global-development/2017/jan/31/morocco-rejoins-african-union-after-more-than-30-years. (Accessed May 2020)

[450] Arpan Banerjee "Moroccan Entry to the African Union and the Revival of the Western Sahara Dispute" (2017) 59 *Harvard International Law Journal*, 1

Western Sahara.[451] In particular, the United Nations General Assembly, the International Court of Justice and the European Court of Justice all recognized the right to self-determination of the people of Western Sahara and the General Assembly characterized the situation as an occupation.[452]

In view of this, the dispute regarding the legitimacy of Fisheries Agreement and 2013 Protocol signed between the European Union and Morocco, the European Court of Justice's Advocate General put forward an opinion in January 2018 that reiterates the right to self-determination of the people of Western Sahara.[453] Thus, according to the Advocate General, the Fisheries agreement is void because it infringes the right to self-determination of the people of Western Sahara and because the manner and way it was concluded does not conform with the principle of permanent sovereignty over natural resources or IHL applicable to the conclusion of international agreements regarding the exploitation of natural resources of occupied territory.[454]

Consequently, Morocco being a party to the four 1949 Geneva Conventions and Additional Protocol 1, and the declaration of the Polisario Front under Article 96(3) to apply the Geneva Conventions and Additional Protocol I were accepted by the Swiss Federal Government in 2015, the depository, in principle makes the conflict international in character.[455]

[451]ICJ, *Western Sahara,* Advisory Opinion, 16 October 1975, para 129
[452]See GA Res 34/37, 21 November 1979; ICJ, *Western Sahara,* Advisory Opinion, 16 October 1975 para 162; ECJ, *Council of the European Union v Populaire pour la liberation de la saguia-el-hamra et du rio de oro (Front Polisario),* C-104/16 P, Judgment 21 December 2016, para 92
[453]ECJ, *Western Sahara Campaign UK, The Queen v. Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, Opinion of Advocate General Wathelet, C-266/16, 10 January 2016, paras 111 and 249
[454]*Ibid*, para 256 ff
[455]For further information, see the classification section on Wars of National Liberation

2.6.6 The Boko Haram Armed Group

The present leader of Boko Haram is AbubakarShekau. He became the leader of the group after the death of its founding leader, Mohammed Yusuf, in July 2009.[456] In June 2011, the Nigerian government established a Joint Task Force (JTF) with a clear mandate to 'restore law and order' in the north-eastern part of the country.[457] With the civilians mostly affected by the conflict, vigilante groups started to emerge around 2013.[458] Subsequently, the Nigerian government noticed their ability in terms of intelligence gathering and manpower and for this reason; the government employed their services and enlists them under the supervision of the Joint Task Force.[459] Ever since, they became known as the Civilian Joint Task Force and have contributed greatly in the fight against Boko Haram.[460] Attacks launched by the group continue to have devastating effects on civilians and constitute significant challenge for the Nigerian government. For example, in 2017, numerous Boko Haram suicide bombers have targeted market places, university of Maiduguri and other tertiary institutions, as well as internally displaced camps.[461] Specifically, on 25 July 2017, Boko Haram attacked an oil exploration team from the Nigerian National Petroleum Corporation in MagumeriBorno State, killing no less than 69 people and abducted at least 7 people.[462] These series of attacks continued throughout 2018, targeting both civilians and the Nigerian security forces along with their counterparts from the MNJTF. While the Nigerian government expressed that it

[456]EmekaOkereke "From Obscurity to Global Visibility: PeriscopingAbubakarShekau" (2014) 6(10) *Counter Terrorism Trends and Analyses*, 17
[457]Hussein Solomon "Counter-Terrorism in Nigeria: Responding to Boko Haram" (2012) 157(4) *The Rusi Journal*, 6
[458]Agbiboa Daniel, "Resistance to Boko Haram: Civilian Joint Task Force in North-Eastern Nigeria" (2015) 20 *Conflict Studies Quarterly*, 3
[459]Kelechi J Ani and Jude O Chukwu, "Counter-Terrorism Operations in Nigeria: Analyzing Civil-Military Relations" (2014) 18(1) *The Journal of International Issues*, 124
[460]*ibid*
[461]VesnaMarkovic "Suicide Squad: Boko Haram's use of the Female Suicide Bomber" (2019) 5 *Journal of Women and Criminal Justice*, 283
[462]Nigeria- World Report 2018, Available at:https://www.hrw.org/world-report/2018/country-chapters/nigeria (Accessed March 2020)

has weaken the groups' capacity and destroyed several of their camps, but the groups' ability tolaunch attacks signals their strength.[463]

Through 2019, the group has remained strong and unwavering, especially in Borno, Yobe and Adamawa states of north-eastern part of Nigeria. For instance, just prior to the February2019 presidential elections, there were about 73 attacks with almost 406 related casualties. In January 2019, the group attacked Rann village in Borno State which led to damaging all civilian buildings, killing about 60 people who attempted to escape and as a result, over 30,000 people were displaced.[464] In early 2020, hostilities between the security forces and the Boko Haram armed group have significantly intensified in the northeast.

To effectively destroy or at least weaken the Boko Haram armed group, the Nigerian government has procured many strong military hardware to fight the group. For instance, in July 2017, the Nigerian government procured $593 million worth of combat equipment from the United States, including Super Tucano A-29 surveillance and assault planes.[465] In April 2018, the Nigerian President, Muhammadu Buhari approved the procurement of $ 1 billion worth of arms in order to fight the Boko Haram armed group.[466] Meanwhile, Boko Haram's military assets and arsenal includes improvised explosive devices, AK47s, grenades, mortars,

[463]Samson Toromade "Presidency says Boko Haram remains technically defeated despite Metele attack," Available at:https://www.pulse.ng/news/local/presidency-says-boko-haram-remains-technically-defeated-despite-metele-attack/d4l6sxy (Accessed March 2020)
[464] Hilary Matfess, "The New Normal: Continuity and Boko Haram's Violence in North-East Nigeria," Available at:https://reliefweb.int/report/nigeria/new-normal-continuity-and-boko-haram-s-violence-north-east-nigeria (Accessed March 2020)
[465]Valerie Insinna, "US Approves the Sale of Super Tucano A-29 to Nigeria," Available at:https://www.defensenews.com/air/2017/08/03/us-approves-a-29-super-tucano-sale-to-nigeria/ (Accessed May 2020)
[466]Premium Times, "Nigeria's Buhari Approves $ 1 Billion for Purchase of Arms," Available at:https://www.premiumtimesng.com/news/headlines/264026-buhari-approves-1-billion-for-purchase-of-arms.html (Accessed May 2020)

Hilux trucks and petrol bombs.[467] In addition, it is alleged that Boko Haram also operates with rocket-propelled grenades and also have the capacity to manufacture weapons.[468]

The intensity of the hostilities is further indicated by the number of fatalities and displaced persons. Since the conflicted started in 2009, Boko Haram alone is accountable for the death of more than 30,000 lives.[469] The Council on Foreign Relations indicated an aggregate of 37.530 deaths linked to Boko Haram in Nigeria between May 2011 and July 2020.[470] Amnesty International has also reported that thousands of women and girls have been abducted by the group and about 2.5 million people are internally displaced and about 244,000 people are taking refuge in neighboring countries of Chad, Cameroon and Niger; more than 7.1 million people are in dire need of humanitarian assistance in Borno, Yobe and Adamawa states of north-eastern part of Nigeria.[471]

Over the past years, Boko Haram was able to gain control of substantial amount of territory in northeastern region of Nigeria. AbubakarShekau declared the area as his caliphate and from this base he launches attacks against his targets in Nigeria and in neighboring States. Even though the group has sustained significant losses in terms of manpower, as of July 2020, the group is still in control of substantial portion of Nigerian territory, particularly the areas surrounding the Sambisa forest, the Mandara Mountains and the Islands of Lake

[467]Terrence McCoy "Paying for Terrorism: Where Does Boko Haram gets Money From?" Available at:https://www.independent.co.uk/news/world/africa/paying-for-terrorism-where-does-boko-haram-gets-its-money-from-9503948.html (Accessed May 2020)
[468] YouTube, "Boko Haram Released Photos apparently showing pictures of Rocket making factory in North-Eastern Nigeria," Available at: https://www.youtube.com/watch?v=kGAfYKpq85s (Accessed July 2020); BBC "Nigeria's Boko Haram Reveals Rocket Making Factory," Available at: https://www.bbc.co.uk/news/world-africa-34703173 (Accessed April 2020)
[469]O Lanre "About 20 Nigerian Soldiers Missing after Boko Haram Clash," Available at: https://uk.reuters.com/article/uk-nigeria-security/about-20-nigerian-soldiers-missing-after-boko-haram-clash-sources-idUKKBN1K628F (Accessed April, 2020)
[470]Global Conflict Tracker, "Boko Haram in Nigeria," Available at:https://www.cfr.org/global-conflict-tracker/conflict/boko-haram-nigeria (Accessed July 2020)
[471] Human Rights Watch, "Nigeria: Events of 2017,"Available at:https://reliefweb.int/report/nigeria/world-report-2018-nigeria-events-2017 (Accessed April, 2020); World Report 2018

Chad.[472] Since 2014, Boko Haram has remarkably retained the capacity and ability to engage in devastating attacks and has maintained a consistent level of activity since then.

2.6.7 The Al-Ansar Splinter Group

As discussed in chapter 1, Boko Haram was founded by Mohammed Yusuf who was the leader of the group until he was killed in July 2009 by the Nigerian police. In July 2010, AbubakarShekau became the new leader of the group and was responsible for launching attacks on worship places, security forces, and schools as well as using young children as suicide bombers.[473] In January 2012, a faction known as Al Ansar (The Vanguard for the protection of Muslims in Black Africa) seceded from Boko Haram over dispute of indiscriminate attacks of Muslims by Shekau.[474] The faction's leader, Khalid al Barnawi was reportedly trained with Al Qaeda's regional group, AQIM.[475] The splinter group which operates in northern Nigeria, declared itself as a 'humane' alternative to Boko Haram and that it would only focus on targeting the Nigerian government and Christians in "self-defense."[476] In November 2012, the group attacked police station in Abuja, killed police officers and freed some detained terrorists from the police cell. The group was also involved in several kidnapping activities especially foreign nationals. The group has reportedly kidnapped a French engineer in late 2012 and in early 2013; the group has again reportedly kidnapped and killed about seven foreign contractors.[477]

However, security experts have stated that the two groups have remained operationally connected with each other. Jacob Zenn, a security analyst has maintained that

[472]Global Conflict Tracker, "Boko Haram in Nigeria," Available at:https://www.cfr.org/global-conflict-tracker/conflict/boko-haram-nigeria (Accessed July 2020)
[473]YossefBodansky, "The Boko Haram and Nigerian Jihadism" (2015) 318 *ISPSW Strategy Series: Focus on Defense and International Security*, 1
[474]*Ibid*, at 9
[475]*Ibid*, at 13
[476]*Ibid*
[477]*Ibid*

the Ansaru group acts as an 'external unit' of Boko Haram.[478] While David Otto, another analyst, also noted that the two groups work together "towards a common goal."[479] In April 2016, Khalid al Barnawi was allegedly arrested by the Nigerian government and charged him with the abduction and murder of ten foreigners. Although the Ansaru faction purports to identify itself with Boko Haram's campaign objectives, it has however, blamed and condemned the group for targeting Muslims. At the time of writing this thesis, the leadership structure of the group remains unclear and the intensity of their activities is not sufficient enough to conclude with certainty that there is an 'armed conflict between the Ansaru and Nigerian government. Also, the exact number of its members is still unknown and it is not in control of any part of Nigeria's territory. Therefore, without any credible information, it is impossible to unequivocally conclude that the Ansaru faction meets the required intensity of protracted violence, organization, as well as territorial control as set out in Common Article 3 and Additional Protocol II of the 1949 Geneva Conventions.

2.6.8 The Islamic State of West Africa Province "ISWAP"

In March 2015, the leader of Boko Haram AbubakarShekau pledged his allegiance to the Islamic State 'ISIS' and thereafter renamed its group to 'Islamic State in West Africa Province "ISWAP." In August 2016, about a year and half later, ISIS recognized Abu Musab al Barnawi as the new leader of the group. AbubakarShekau quickly denied the change in leadership and referred to ISIS's decision as a coup against him. According to U.S Marine Lt. General Thomas Waldhauser, ISIS replaced Shekau because he refused to obey ISIS's orders to stop targeting Muslims, and not to use children as suicide bombers.[480] This led the group to

[478]Jacob Zenn, "Leadership Analysis of Boko Haram and Ansaru in Nigeria," (2014) 7(2) *Combating Terrorism Centre*, 1

[479]LudovicaLaccino, "Boko Haram splits as AbubakarShekau and Abu Musab al Barnawi fight for Leadership," (2016) International Business Times, available at: https://www.ibtimes.co.uk/boko-haram-splits-abubakar-shekau-abu-musab-al-barnawi-fight-leadership-1574271 (Accessed July 2020)

[480] Committee on Armed Services, "Hearing on the Nomination of Lieutenant General Thomas D Waldhauser, USMC, to be General and Commander, United States Africa Command; and Lieutenant General Joseph L Lengyel, Ang, to be General and Chief of the National Guard Bureau," June 21, 2016, available

split into warring factions: one loyal to AbubakarShekau, and the other to the ISIS appointed leader Abu Musab al Barnawi. The group led by AbubakarShekau retained the name Boko Haram, whereas, the faction led by the ISIS appointed leader Abu Musab al Barnawi retained the name ISWAP.[481] According to some reports, the two factions have clashed in the following months. However, these events of clashes between the two groups have remained sporadic and since then, there is no concrete information of further confrontation between the two groups.[482]

It has been reported that between 2018 and 2019, internal dispute in the ISWAP faction led to the change in leadership: MammanNur, a ranking member of the faction was reportedly executed because he was found to be too lenient, and Abu Musab was overthrown and Abu Abdallah allegedly became the new leader of the ISWAP group.[483] The group is reported to have been settling among the civilian population in the surrounding villages of the Lake Chad islands. Their close relationship with the villagers was crucial for them to buy food and medicine as well as carry out its businesses of selling charcoal, fish, hides, and cattle. The group might have succeeded in gaining the trust of the civilian population may be due to its tactics, different from that of Boko Haram. While the latter attacks civilians, ISWAP focuses mainly on military objectives and only targets civilians suspected to be informers to the government.[484] But at present, there is no report or information that the group is exercising any territorial control in Nigeria.

Initially, ISWAP restricted its activities around the shores of Lake Chad but of recent, the group has started extending its range. In particular, on 23 February 2019, the group

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at:https://www.armed-services.senate.gov/hearings/16-06-21-nominations_--waldhauser-lengyel (Accessed July 2020)

[481]*ibid*

[482]Boko Haram: Nigeria's Islamic Group, available at:https://www.britannica.com/topic/Boko-Haram (Accessed January 2020)

[483]*ibid*

[484]International Crisis Group, "Facing the Challenge of the Islamic State in West Africa Province," Report no 273, 16 May 2019

launched its first assault in Maiduguri, the capital city of Borno state. Thereafter, on 12 January 2020, the group engaged with the Nigerian forces in the Lake Chad area, killing about 4 ISWAP members.[485] However, at the time of writing this thesis, aside from the isolated and sporadic attacks demonstrated above, there is no concrete and credible evidence which suggest that the degree of intensity of the violence is high and protracted to conclude that there is a non-international armed conflict between Nigeria and ISWAP; however, it is worth mentioning this development and to continue monitoring the evolution of the situation.

2.6.9 International Interventions in the Boko Haram Armed Conflict

Since January 2015, the Multinational Joint Task Force has been assisting Nigeria in the battle against Boko Haram. The task force involves squads from five neighboring countries, including Nigeria, Chad, Cameroon, Niger and Benin.[486] The task force operates under the authorized African Union Security Council's mandate with the sole objective of eradicating Boko Haram, and the action is also supported by the United Nations Security Council.

In 2018, the Multinational Joint Task Force successfully rescued about 1,000 Boko Haram abductees, mostly women and children, along with some number of men that were forcefully recruited by Boko Haram.[487] However, because the Multinational Joint Task Force has intervened in Nigeria with the consent of the Nigerian Government, its intervention does not affect the classification of the conflict under international humanitarian law.

In conclusion, it is indisputable that there exists a protracted armed violence between the Nigerian armed forces and the Boko Haram armed group on the territory of Nigeria. The ability of the group to plan and execute sustained military operation under Abu Shekau has

[485]Report of the UN Secretary-General, UN Security Council S/2020/652, available at:https://childrenandarmedconflict.un.org/wp-content/uploads/2020/07/report-NIGERIA.pdf (Accessed August 2020) Para 16

[486]William Assanvo, Jeannine E A, and WendyamSawadogo, "Assessing the Multinational Joint Task Force against Boko Haram," (2016) 19 *West Africa Report: Institute for Security Studies*, 1

[487]Nigeria: 1,000 Hostages Rescued from Boko Haram, Available at:https://www.aljazeera.com/news/2018/05/nigeria-1000-hostages-rescued-boko-haram-180507181832376.html (Accessed May 2020)

demonstrated that the group has satisfied the test of organisation. The group also exercises control of territory significant part of Nigerian territory in the north-eastern region of the country. As noted above, the Ansaru group has aligned with Boko Haram group while there has been disagreement between Boko Haram and ISWAP armed group, the conflict is rather sporadic and isolated to suggest that there is non-international armed conflict between the two groups. Again, the hostility between ISWAP and Nigeria is not high and protracted to simply conclude that there is internal armed conflict between the group and Nigeria. The groups' structure is unknown and there is no credible evidence which suggest that the group is in control of territory – they settle around the Lake Chad region of Borno State and not in control. In addition, the character of the conflict does not change because of crossing borders.[488] Similarly, reading through the systematically reviewed legal framework on classification of armed conflicts above, suggests that the law of non-international armed conflict apply to the conflict between Boko Haram and Nigeria because Nigeria does not have effective control over Boko Haram, it is not a State organ and does not belong to any of the multi-national forces. Except where any one of the States comprising the multi-national joint task force exercises control over the territory of, or any portion of the countries involved, then technically, the existing non-international armed conflict will metamorphosed to international armed conflict between such country and the occupied State.[489] But this happens only in the absence of consent of the State on whose territory military offensives are carried out.

Having investigated the notion of non-international armed conflict, below we will consider the substantive law that regulate the conduct of such conflict, including the applicable scope of that law.

[488] *Supra*, note 267
[489] *Supra*, note 11 ICRC Commentary p 60

2.7 Scope of Application of IHL Rules in an Internal Armed Conflict

Before reviewing the fundamental rules of an armed conflict, it is important to determine the circumstances in which the rules apply. This section largely seeks to demonstrate on the situation of armed conflict established as non-international armed conflict, an issue that was reviewed above. Further to the existence of non-international armed conflict, other crucial issues have to be reviewed, namely; the geographical and temporal application of the rules. In essence, there is a need to establish to whom the law applies, both the persons that enjoy its protection and those who are bound by it, the geographical extent of the law, in addition to its temporal limitations.

2.7.1 Geographical Application of International Humanitarian Law of Non-International Armed Conflict

The first question that stems from the scope of application of the law of non-international armed conflict deals with the geographical boundaries within which the law applies. Common Article 3 provides, 'in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting parties, each Party to the conflict shall be bound to apply as minimum, the following provisions.' Reference to the territory of a High Contracting Party is also made in the scope of application clause of Additional Protocol II.[490] In this regard, Stewart noted it is possible that these referrals suggest that the relevant provisions apply in the whole territory of the state engaged in the conflict.[491] Similarly, the Appeals Chamber of the Criminal Tribunal of the former Yugoslavia in the *Tadic*Decision on Interlocutory Appeal holds that 'international humanitarian law continues to apply in … the

[490] Article 1 Additional Protocol II

[491] James G Stewart "Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict" (2003) 85(850) *International Review of the Red Cross*, 313

whole territory under the control of a party, whether or not actual combat takes place there.[492]

However, it appears highly unlikely that international humanitarian law should at all times apply in the territory of the state in which the conflict takes place. This is because, an armed conflict that is restricted to a limited portion of a large country such as the case in Nigeria, should not make international humanitarian law applicable across the whole country. In this regard, it was expressed in the 1972 Conference of Government Experts that it was 'inconceivable that, in the case of a disturbance in one specific part of a State, whole territory of the State should be subjected to the application of the Protocol.'[493] Certainly, in some non-international armed conflicts, it could be entirely right for international humanitarian law to apply in the entire state if the conflict roars across the country. However, this will be different if the conflict is restricted to territorially enclosed region.[494] For example, the armed conflict between Nigeria and Boko Haram is limited to the North-Eastern region of the country.

It is important to understand that the geographical focus would require a specific link between the conduct as an issue and the applicable law. The wording of Additional Protocol II has noted such nexus: the 'Protocol shall be applied… to all persons affected by an armed conflict.'[495] Also, the ICRC Commentary clarified by noting that the applicability of the Protocol follows from a criteria linked to individuals, and not places,'[496] and takes into account the criticism made at the 1972 Conference of Government Experts relating to violence in a small part of a state's territory.[497]

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[492]*Prosecutor v. Tadic*, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October, 1995, Para 70
[493] Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, volume 1 (1972) 68 Para 2.59
[494] Gabor Rona "Interesting Times for International Humanitarian Law: Challenges from the on Terror" (2005) 17(1) *Journal of Terrorism and Political Violence*, 157
[495] Article 2(1) Additional Protocol II
[496]Sandoz Y, Swinarski C and Zmmermann B *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987) Para 1360
[497] ICRC, Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary (October 1973) 134.

This view was noted under Article 5 of Additional Protocol II where it states that the international humanitarian law rules on 'persons whose liberty has been restricted' apply only to those deprived of their liberty 'for reasons related to the armed conflict.' Similarly, the provision on panel prosecution also applies to criminal acts 'related to the armed conflict.'[498] This also applies to the displacement of the civilian population, which 'shall not be ordered for reasons related to the conflict.[499] So long as relief civil societies are concerned, they may provide their services 'in relation to the victims of the armed conflict.'[500] On its part, the *Kayishema* Trial Judgment provides that: "Violations of these international instruments (common Article 3 and Protocol II) could be committed outside the theatre of combat. For example, the captured members of the RPF (Rwandan Patriotic Front) may be brought to any location within the territory of Rwanda and could be under the control or in the hands of persons who are not members of the armed forces. Therefore, every crime should be considered on a case-by-case basis taking into account the material evidence presented by the Prosecution."[501]

In summary, the scope of application of the rules outside the main combat region will have to be determined on a case by case basis which would be more difficult in its application on the ground. However, it is argued that the nexus based approach to the application of the law surpass the difficulty faced in the implementation. Location will remain to be an essential factor, however, and it may affect the substance of a rule.[502]

2.7.2 Temporal Scope of Application of the Rules

The second question that is likely to arise relates to the temporal scope of application of the rule of non-international armed conflict. That law changes the applicable law of peace time

[498] Article 6 Additional Protocol II
[499] Article 17 Additional Protocol II
[500] Article 18(1) Additional Protocol II
[501] *Prosecutor v. Kayishema and Ruzindana* ICTR-95-1-T, Judgment, 12 May 1999, Para 176
[502] Martha M Bradley "Expanding the Borders of Common Article 3 in Non-International Armed Conflicts: Amending its Geographical Application through Subsequent Practice?" (2017) 64 *Netherlands International Law Review*, 375

once there is an outbreak of non-international armed conflict.[503] When the law should cease to apply is somewhat more complicated. The conventional rules again did not provide any guidance on this issue.

However, the ICRC Commentary on Additional Protocol II states that the law will no longer be applicable 'after the end of hostilities.'[504] It is not very clear whether this is referring to the cessation of active hostilities, customarily by means of a cease fire agreement or the total close of hostilities, generally through a peace agreement. The ICRC recommended to the 1972 Conference of Government Experts that the draft Additional Protocol 'shall cease to apply at the end of hostilities, that is when a general cease fire is declared;' but, a similar recommendation made for the application of international humanitarian law to 'cease to apply following a general cessation of military operations' at the 1974-7 Diplomatic Conference was not adopted.[505] Considering that several ceasefire agreements specially provide for the continued enforcement of international humanitarian law,[506] in reality, the law of non-international armed conflict continues to apply even after the cessation of active hostilities.

Accordingly, the functions of some specific aspects of IHL after the end of active hostilities uphold this conclusion.[507] Otherwise, the application of IHL would cease to apply following the total shutdown of hostilities, in that case, a peaceful relation returns between the parties. This is normally done through peace agreement. For this reason, the *Tadic*Appeals Chamber noted that the "law extends beyond the cessation of hostilities until… a peaceful settlement is achieved.[508] Marco also expressed that the enforcement of

[503]*Supra*, note 271*Tadic*Decision on Interlocutory Appeal on Jurisdiction, Para 70
[504]*Supra*, note 496 at para 1360
[505] ICRC, Conference of Government Experts on the Reaffirmation and Development of international Humanitarian Law Applicable in Armed Conflict, Geneva, May-3 June 1972 (Second Session): II Commentary, Part Two, Documentary Material Submitted by the International Committee of the Red Cross (January 1972) 8; Official Records, Vol.4
[506]*Ibid* at 132
[507]*Supra*, note *Tadic* Decision on Interlocutory Appeal on Jurisdiction, para 67
[508]*Ibid* at para 70

international humanitarian law rules of non-international armed conflict would terminate following a full military victory by either of the parties to the conflict.[509]

The essential principle is that the cessation of armed conflict simultaneously ends the application of those aspects of IHL that regulates conduct of non-international armed conflict. While the end of an armed conflict should not be treated lightly, with military activities having to end with stability, any analysis of the presumably honest question of whether an international or non-international armed conflict have actually ended will at least to a degree be determined by the international community and the implications of any finding regarding termination. Likewise, these rules may be simple to state, they can be very complex to apply in practice, and that, at least, unavoidable.

2.7.3 Protection of Civilians and Persons Hors de Combat in Internal Armed Conflicts

Here, we focus on the rules concerning the protection of civilians and persons hors de combat in internal armed conflicts. Application of these rules has since been established and acknowledged in history, and was listed in the instructions of General Dufour published during the Swiss civil war in 1847, and are to be provided in the Tratado de Regularizacion of 1820 completed during the Colombian war of independence.[510] These rules were similarly listed in the first methodical regulation of internal armed conflict, specifically Common Article 3 of the 1949 Geneva Conventions. Presently, there are many rules that relate to the treatment of civilians during armed conflict but, this study will concentrate on the principle of humane treatment and certain rules arising from it.

2.7.4 The Principle of Humane Treatment

The principle of humane treatment is the essential principle that guides IHL concerning the treatment of persons in the hands of an enemy party, whether such persons are civilians or

[509] Marco Milanovic "End of Application of International Humanitarian Law" (2014) *International Review of the Red Cross,*

[510] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974-1977 Vol.1,3 (Federal Political Dept, 1978)

hors de combat. The provision of Common Article 3 states that persons who do not take active part in hostilities 'shall in all circumstances be treated humanely.'[511] Accordingly, Additional Protocol II sets out an entire part on 'humane treatment,' outlining essential assurances concerning such persons.[512] Additionally, the principle is also recognized as a norm of customary international law.[513] The requirement to treat persons humanely has also been expressed in ad hoc, ceasefire, and peace agreements.[514]

Comprehensive exposition of the principle of humane treatment had been criticized as 'pointless' for want of being self-evident and 'dangerous' for the concern of enforcing unexpected limitations.[515] However, David Elder expressed that lack of exposition may result to affording excessive freedom to the parties to the conflict.[516] In view of that, a cordial middle ground that would guide the parties to the conflict is paramount while not unduly restricting the scope of the principle.

2.7.5 Violence to Life and Person

Violence to life and person against individuals in the custody of an adverse party is prohibited both in conventional and customary international humanitarian law.[517] Similarly,

[511] Common Article 3(1)
[512] Additional Protocol II, Part II
[513] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (1986) ICJ Rep 14, 114 Paras 218-20; Customary International Humanitarian Law, Rule 87
[514] See Part IV, Article 4(1) of the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Philippines and the NDFP stated that' persons hors de combat and who do not take a direct part in hostilities are entitled to respect for their lives, dignity, human rights, political convictions and their moral and physical integrity ad shall be protected in all situations and treated humanely without any adverse distinction founded on race, colour, faith, sex, birth, social distancing or any other similar criteria.' Article 2(1) of the 2002 Ceasefire Agreement between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam stated that the parties shall in accordance with international law abstain from hostile acts against the civilian population, including such acts as torture, intimidation, abduction, extortion, and harassment.
Pursuant to Article 25, Para 91 of a 2006 agreement of Sudan and the Eastern Sudan Front (ESF), the parties agreed to refrain from all acts of violence against civilians, as well as threats directed at them and their forceful displacement, and the peaceful agreement reached between them also included an obligation to abstain from exposing 'civilians to any form of violence, harassment, intimidation, and forced displacement.'
[515] Jean S Pictet*The Geneva Conventions of 12 August 1949, Commentary: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* Ed (ICRC, 1952) 53
[516] David A Elder "The Historical Background of Common Article 3 of the Geneva Convention of 1949" (1979) 11(1) *Case Western Reserve Journal of International Law,*61
[517] Common Article 3; Article 4 Additional Protocol II; Article 8(2)(c)(i); Report of the Secretary General on the establishment of a Special Court for Sierra Leone, S/2000/915, 4th October 2000, at para 14

conducts such as cruel treatment, mutilation, murder, torture, scientific experimentation, and corporal punishment are also proscribed.[518] Generally, the fundamental protection under this principle is that of physical integrity. This was noted by the UN General Assembly Resolution 2675 (XXV) where it submitted that 'civilian populations, or individual members thereof, should not be the object of… assault on their integrity.'[519] This applies to both the physical and emotional well-being of the individual concern.[520] Scholars in the field of humanitarian law were careful not to go into too much into specifics - taking into consideration that 'the more specific and thorough a list tries to be, the more restrictive it becomes.'[521] In view of this, even though the language of 'violence to life and person' is perhaps not adequately clear for international criminal law purposes, thus, the *Vasiljevic*Trial Chamber acquitted the defendant on that charge,[522] its manner of open ended nature is important for the law of armed conflict.

2.7.6 Outrages upon Personal Dignity

Outrages upon personal dignity are also proscribed in both conventional and customary international law.[523] In this regard, the *Aleksovski* Appeal Chamber stated that outrages upon personal dignity are primarily part of the broader prohibition on inhumane treatment.[524] The Trial Chamber in *Furundzjia* case observed that the proscription is 'intended to protect persons from outrages upon their personal dignity, whether such outrages are conducted by illegally attacking the body or by humiliating and demeaning the honour, the self-respect or the mental health of an individual.'[525] In spite of the suggestion of the ICTY, the proscription on inhumane treatment and the proscription on outrages upon personal dignity are of different

[518] Article 4(2) Additional Protocol II, Common Article 3; Article 8(2)(c)(i) and 8(2)(c)(xi) Rome Statute
[519] General Assembly Res 2675 (XXV) (1970)
[520] Article 4(2)(a) Additional Protocol II
[521] *Supra*, note 515 at 54
[522] *Prosecutor v. Vasiljevic* IT-98-32-T, Judgment, 29 November 2002, paras 193-204
[523] Common Article 3; Article 8(2)(c)(ii) Rome Statute; Article 4(2)(e) Additional Protocol II; *Nicaragua v. United States of America* (1986) ICJ Rep 114 Para 218
[524] *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgment, 24 March 2000, Para 26
[525] *Prosecutor v. Furundzjia*, IT-95-17/1-T, Judgment, 10 December 1998, Para 183

types. While inhumane treatment circles around notions of integrity of the body and mind, outrages upon personal dignity relate to notions of protection from 'public curiosity.'[526]

Similarly, the offence of rape and enforced prostitution are also considered as outrages upon personal dignity. They are likewise connected with, and often described as, humiliating and degrading treatment. Thus, Common Article 3 proscribes 'outrages upon personal dignity, especially, degrading and humiliating treatment.' The ICTY Trial Chamber in *Kunarac* case defined acts or omissions that cause humiliating, degradation, or attacks on human dignity.[527] Likewise, the *Aleksovski* Trial Chamber also noted that the acts or omission does not necessarily need to result in actual harm; rather, it is sufficient that they cause pain.[528] The prohibition is assessed both objectively and subjectively by the courts. Objectively, the *Kunarac* Trial Chamber noted that the act should cause humiliation, degradation, or an attack on human dignity,[529] and will be determined by factors such as the "form, severity and duration of the violence and the intensity and duration of the physical or mental pain.'[530] Subjectively, a person's 'temperament or sensitivity' should be included[531] as well as the 'cultural background' of the victim.[532] In the *Kunarac* case, the Trial Chamber noted that 'there is no least temporal requirement;' the humiliation must be more than 'fleeing' yet must not be 'lasting.'[533] Further, for the reasons of criminalizing the crime of committing outrages upon personal dignity, the humiliation must be grave.[534]

2.7.7 Sexual Violence

Rape, enforced prostitution, indecent assault, and threats thereof are all proscribed in Article 4(2) (e) and (h) Additional Protocol II. These prohibitions are now regarded as rules of

[526] The 1929 Geneva Convention relative to the Treatment of Prisoners of War, Article 2; *Trial of Lt General Kurt Maelzer*, XI Law Reports of Trials of War Criminals 53
[527] *Prosecutor v. Kunarac*, IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, Para 514
[528] *Prosecutor v. Aleksovski*, IT-95-14/1-T, Judgment, 25 June1999, Para 56
[529] *Prosecutor v. Kunarac*, IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, Para 507
[530] *Prosecutor v. Aleksovski*, IT-95-14/1-T, Judgment, 25 June 1999, Para 57
[531] *Prosecutor v. Kvocka et al*, IT-98-30/1-T, Judgment, 2 November 2001, Para 167
[532] Article 8(2)(c)(ii)-1 ICC Elements of Crimes
[533] *Supra*, note 529 *Kunarac* Trial Judgment, Para 501
[534] *ibid*

customary international humanitarian law.[535] Even though it is listed under the category of outrages upon personal dignity, as noted above, the proscription is a subset in itself under the wider category of humane treatment. This is now recognized, with the Rome Statute citing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence as war crimes independent of each other, instead of being a sub category of the proscription on outrages upon personal dignity.[536]

2.7.8 Fundamental Principles Regulating the Conduct of Hostilities in Internal Armed Conflicts

The question of whether international law governs the conduct of hostilities in internal international armed conflicts has been a subject of debate among international law scholars. Antonio Cassese, a distinguished scholar of international law sought to interpret the provisions concerning conduct of hostilities from the protection provided by Common Article 3.[537] Likewise, certain judicial pronouncements and consequential authorities have taken a similar opinion.[538] This emanates at least, partly, from the perception maintained by some that the provisions concerning the conduct of hostilities forms part of the requirement of humane treatment. For instance, in 1949 during the Diplomatic Conference, the USSR offered a suggestion based on the principle of inhumane treatment that the principle should be reviewed to include 'measures such as 'the prohibition on' the destruction of property not to be rendered crucial by military operations.'[539] However, other scholars offered a different opinion, arguing that Common Article 3 does not include provisions on conduct of

[535] Customary International Humanitarian Law, Rule 93; Rome Statute, Article 8(2)(e)(iv)
[536] Article 8(2) (e) (vi), Rome Statute
[537] Antonio Cassese "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law" (1984) 3(55) *UCLA Pacific Basin Law Journal*, p 105 APV Rogers *Law on the Battlefield* (Manchester University Press, 2004) 221
[538] *The Public Committee against Torture in Israel v The Government of Israel*,(2005) HCJ 769/02, Judgment, Para 30; Inter-American Commission on Human Rights, Third Report on the Human Rights situation in Colombia, OEA/Ser.L/V/II.102, Doc Rev 1, 26 February 1999, Chapter IV, Para 42 Available at: https://www.legal-tools.org/doc/8385d8/pdf (Accessed May 2020)
[539] Final Record of the Diplomatic Conference of Geneva of 1949 Vol. II-B (Federal Political Department) 327 Available at: https://www.loc.gov/rr/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-2-B.pdf (Accessed May 2020

hostilities.[540] This approach was endorsed by some courts and consequential institutions. In the same vein, objections emerged with regards to Additional Protocol II, with some agreeing with the analysis that the legislation regulates the conduct of hostilities,[541] while others expressed different opinion.[542] This reflects the different opinions that were voiced at the 1974-1977 Diplomatic Conference, with some countries sceptical about whether 'combat rules'… were suitable in a Protocol to be applied specifically within the territory of a single State.[543] However, it has been argued that Additional Protocol II contains provisions on the conduct of hostilities, and that other conventional legislations that govern the conduct of hostilities were broadened to include non-international armed conflicts within their scope of application.[544] In fact, with regards to the provisions governing the conduct of hostilities, some argued that it is really irrelevant to differentiate between international and non-international armed conflicts in this respect.[545] The fundamental aim of international humanitarian law is to strike a balance between military objectives and unnecessary infliction of harm to civilians and their objects during military confrontation.[546]

The asymmetric nature of contemporary conflict particularly the Boko Haram conflict, has no doubt led to many issues as it relates to the application of IHL rules.[547]The Boko Haram armed group had presented itself as a group which strives to wage war against "adulterated Muslims," and the state of Nigeria to create a "pure" Islamic state to be governed by "Sharia law." The group pursues these objectives by bombing religious place of

[540] Roberts Adam "The Law of War: Problems of Implementation in Contemporary Conflicts" (1995) 6(11) *Duke Journal of Comparative and International Law*, 12
[541] Lindsay Moir *The Law of Internal Armed Conflict* (Cambridge University Press, 2002) 116
[542]JelenaPejic "The Protective Scope of Common Article 3: More than meets the eye" (2011) 93(881) *International Review of the Red Cross*, 189
[543] See Para 6 'Canada' in the Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) Vol. 5, 184 (Federal Political Department, 1978)
[544] Heike Spieker "Twenty-five Years after the Adoption of Additional Protocol II: Breakthrough or Failure of Humanitarian Legal Protection?" (2001) 4 *Yearbook of International Humanitarian Law*, 129
[545]Dieter Fleck *The Handbook of International Humanitarian Law* (Oxford University Press, 2014)
[546]HaqueAdil Ahmed "Off Target: Selection, Precaution, and Proportionality in the DOD Manual" (2016) *International Law Series. US Naval War College*, 35
[547] Robin Geib "Asymmetric Conflict Structures" (2006) 88 (864) *International Review of Red Cross*, 757

worships without discrimination between Christians and Muslims as well as between military and non-military objectives.[548] Acts ranging from kidnapping, sexual violence, starvation summary execution and deliberate target of civilians are mostly attributed to the Boko Haram group.[549]

Below we will discuss some of the fundamental principles on the conduct of hostilities, starting with a review of distinction, then the principles of proportionality and precaution in that order.

2.7.9 The Principle of Distinction

The basic principle that regulates the conduct of hostilities is distinction: 'the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives.'[550] This is widely embraced as one of the fundamental principle of international humanitarian law.[551] As a result, 'the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.'[552] In fact, protecting the civilian population during hostilities, whether international or non-international, had been characterized as 'the bedrock of modern humanitarian law.'[553]

The tenet of universal protection is confirmed in several ad hoc undertakings. For instance, the agreement between the Government of the Philippines and the Moro Islamic Liberation Front (MILF) stated that 'the parties reconfirm their obligations under

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[548] Andrew Walker "*What Is Boko Haram*?" Special Report 308, (June, 2012),The United States Institute for peace www.usip.org, 1, The group has specifically targeted and assassinated individual Muslims who participate in the establishment in the north, and cooperate with the government in any form. This includes prominent clerics who are critical of its ideology and tactics. Targeted assassination of moderate Muslim clerics such as Ibrahim Birkuti and Sheikh Ja'afar Mahmud Adam in Kano has been attributed to Boko Haram, in 2011, the group has also reportedly executed IdrissaTimta, the Emir of Gwoza, in Borno State; two other royals who were travelling with Timta survived the attack. See: HanibalGoitom "Nigeria: Boko Haram" Report for the U.S. Department of Justice, LL File No. 2014-010945, *The Law Library of Congress*, 1

[549] Orla Marie Buckley "Unregulated Armed Conflict: Non-State Armed Groups, International Humanitarian Law, and Violence in Western Sahara" (2012) 37(3) *North-Carolina Journal of International Law*, 794

[550] Article 48 Additional Protocol I; Customary International Humanitarian Law, Rule 1

[551] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (1996) ICJ Rep, para 78

[552] Article 13(1) Additional Protocol II

[553] *Prosecutor v. Kupreski et al*, IT-95-16-T, Judgment, 14 January 2000, para 521

humanitarian law and human rights law to take constant care to protect the civilian population and civilian properties against the dangers accruing in armed conflicts circumstances.'[554] Similarly, the 2002 agreement between the Government of Sudan and the Sudan People's Liberation Movement (SPLM) noted that the 'parties reconfirm their obligations under international law, including Common Article 3 of the 1949 Geneva Conventions, to take constant care to protect the population, civilians and civilian objects against the dangers arising from military operations.'[555] In the same vein, the Chief of the National Liberation Army (NLA) who was involved in the former Yugoslavia Republic of Macedonia, summarized: 'I reminded the brigade commanders of their duty to respect civilians and their property. I reiterated that the war is between uninformed sides, and that civilians are not part of this war. These directives were included into service regulations and were notified both orally and in writing.'[556] The wording of these agreements and affirmations suggests that the parties were basically reconfirming a prior obligation instead of developing a new obligation through the agreements and affirmation. In light of the Boko Haram armed conflict, Amnesty International reported allegations of extra judicial killing of civilians by the Nigerian Armed forces in 2014 and 2015.[557] It is important to state that by Section 4 items 161 (a-d) of the Traditions, Customs and Ethics of the Nigerian Army, 2005, the Nigerian armed forces are clearly, and in strong terms, prohibited from carrying out attacks against non-military targets, all civilian persons and objects, and objects which do not form part of the mission. It further emphasized that the army must in combat operations, attack military targets only, spare

[554] Article 1, Agreement on the Civilian Protection Component of the International Monitoring Team, 27 October 2009, available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/PH_091027_Agreement%20on%20Civilian%20Protection%20Component.pdf (Accessed May 2020)

[555] Article 1 of the Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement to Protect Non-Combatant Civilians and Civilian Facilities from Military Attack, 10 March 2002

[556] *Prosecutor v. Boskoski*, ICTY Trial, Witness Statement of GzimOstreni, Chief of NLA General Staff), para 51, Exhibit P00497.E

[557] Amnesty International "Stars on their Shoulders, Blood on their Hands: War Crimes Committed by the Nigerian Military" (Peter Benenson, 2015) 40

civilian persons and objects, and restrict destruction to what the mission requires.[558] In further asserting the rule of distinction, it states that where civilian enemies fall into the hands of the armed forces, they must be respected, treated with humane, protected against ill treatment, vengeance and taking of hostage, civilian properties must be respected and not in any way damaged, and they must not be compelled to give information.[559]

Drawing from this fundamental principle of universal protection, some concrete provisions can be discerned. Hence, Additional Protocol II stated that 'the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.'[560] Principally, the civilian population and individual civilians shall not be made object of attack. Again, indiscriminate attacks are proscribed. These provisions show the two main risks encountered by civilians during hostilities.[561] There are provisions on evading or minimizing incidental losses, and on taking precautions. Notwithstanding the proscription and the protections, civilians may still face challenges arising from the military confrontations. The existence of losses of life, damage to civilian objects, and the enormous difficulties does not in and of itself suggest that the rule has been violated.

2.7.10 The Principle of Proportionality

Even where a target is legitimate and the attack is discriminate, such an attack may not necessarily be lawful. An evaluation of the circumstances has to be made to know whether the strike 'may be anticipated to cause incidental loss of life, injury to civilians, destruction of civilian properties or both, which would be extreme in proportion to the expected military

[558] Section 4 (161) (a) (b) (c) (d) The Nigerian Army Traditions, Customs and Ethics 2005
[559] Section 4 (164) (a) (b) (c) (d) (e) the Nigerian Army Traditions, Customs and Ethics 2005
[560] Article 13(1) Additional Protocol II
[561] ICRC, Commentary on the Additional Protocols, Para 1449

advantage.[562]As such, combatants and military commanders are refrained from arranging and executing indiscriminate attacks.

Even though the principle is not reflected in Additional Protocol, it is however, reflected in other conventions that are applicable in internal armed conflicts.[563] The rule is recognized as one of the universal principles applicable across all conflicts,[564] and it likewise forms part of the principle of distinction or at the very least, its purpose.[565] Therefore, in spite of the conflicting statements, its exclusion from major texts cannot be construed to mean its inapplicability to internal armed conflicts.[566] Without doubt, there is much approval for the application of the provision to internal armed conflict, and it is deemed a norm of customary international law.[567] For instance, while giving remarks on the last phase of the Sri Lankan conflict in 2009, the United States noted that 'the customary rules of armed conflict also require all parties to a conflict to adhere with the principles of distinction and proportionality during military confrontation.[568] Similarly, in 1988, the FMLN of El Salvador declared that it had 'suspended some actions because of having anticipated that they may destroy civilian property that would be excessive with regards to the foreseeable and direct military advantage.[569]

However, the principle of proportionality has been criticized by some scholars. Kristen Dorman criticized the principle for equating two things that has no standard of comparison.[570] Also, Duff criticized the rule for neglecting the 'notion of bringing a

[562] Article 51(5) (b) Additional Protocol I
[563] Article 3(8) (c) Convention on Conventional Weapons, Amended Protocol II; also, Article 7(c) Second Protocol to the Hague Convention on Cultural Property
[564]*Supra*, note 496 at para 1449
[565]Kolb Robert "Military Objectives in International Humanitarian Law" (2015) 28(3) *Leiden Journal of International Law*,691
[566] J Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004) 124
[567] Rule 14, Customary International Humanitarian Law
[568] US Department of State, Report to Congress on Incidents During the Recent Conflict in Sri Lanka (2009) 7
[569] FMLN, *The Legitimacy of Our Methods of Struggle* (Inkworks Press, 1988) 7
[570] Kristen Dorman "Proportionality and Distinction in the International Criminal Tribunal for the Former Yugoslavia" (2005) 12 *Australia International Law Journal*, 84

preponderance of authority to carry on a military target.[571] Be that as it may, Dinstein expressed that there is actually no serious substitute.[572] In what way, thus, is the principle to be applied?

First, the tangible and direct military advantage expected from the attack must be evaluated. As maintained by most states, the military advantage here is concerned with the expected advantage from the attack in general and not from isolated parts thereof.[573] In addition, the notion of 'advantage' should be considered with its ordinary meaning and should not be restricted to doctrines such as 'ground gained' doctrines that are not always applicable in internal armed conflicts.[574] Thus, the military advantage is of the type that is expected; the one whose actual results could serve as a guide to that which was expected, but cannot be anything other than a guide.

Second, it must be reviewed whether the attack will lead to loss of civilian life, injury to civilian population, destruction of civilian properties or a combined effect of all. Customarily restricted to the proximate effects of an attack, it is now agreed that sustained period effects have to be considered, such as deaths arising from the consequences of the destruction of civilian property.[575] Actually, after the 1990-1 Gulf war, it is no longer reasonable to assert that effects arising from destruction of civilian property are not quite predictable.[576] That the scope of this indirect harm could depend on the victim party is insignificant, because the issue is the harm and damage expected and not the actual outcome.

[571] Helen Duffy, *The War on Terror and the Framework of International Law* 2nd Ed (Cambridge University Press, 2015) 374
[572]YoramDinstein, *The Conduct of Hostilities under the Law of International Armed Conflicts* (Cambridge University Press, 2016)
[573] Schindler Dietrich and Jiri Toman, *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and other Documents* (MartinusNijhoff Publishers, 1988)
[574] International Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict with Commentary* (Sanremo, 2006) 24
[575] Rebecca J Barber, "The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan" (2010) 15(3) *Journal of Conflict and Security Law*, 467
[576] Jeff McMahan and Robert Mckim "The Just War and the Gulf War" (1993) 23(4) *Canadian Journal of Philosophy*, 501

[577] When the two opposing criteria have been determined, the test is whether or not the anticipated harm would be 'excessive' against the military advantage expected.

The principle of proportionality does not consider unlawful, any accidental damage arising from an otherwise lawful attack. Thus, heavy losses to the civilian population or substantial destruction of civilian objects do not necessarily render an attack illegal. All else is on whether an attack is excessive. Therefore, excessive has been depicted as meaning 'severe' or 'extensive.'[578] However, each of these depictions alters the equilibrium inherent in the test. In this regard, James Kilcup explained that effects from an attack can be severe or extensive without being excessive, because excessive is a relative concept while extensive is definite.[579] References to 'evidently excessive,' to use the wording of the Rome Statute,[580]express disproportionate amount[581] and no proportionality at all[582] should likewise be bypassed for want of increasing the required limit. Accordingly, the commitment in the 2009 Agreement on the Civilian Protection Component of the International Monitoring Team between the Government of the Philippines and the MILF to 'avoid acts that would cause adverse effect to civilians' goes beyond current standards, because it would prohibit any consequential damage either excessive or not.[583] The notion of 'excessive' is such that any interpretation, even that which is intended to clarify the test, may have the effect of distorting instead of clarifying the meaning.

[577]Rogier Bartels "Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials" (2013) 46(2) *Israel Law Review*, 271
[578] Ben Clarke "Proportionality in Armed Conflict: A Principle in Need of Clarification" (2012) 3(1) *Journal of International Humanitarian Legal Studies*, 73
[579] James Kilcup "Proportionality in Customary International Law: An Argument against Aspirational Laws of War" (2017) 7(1) *Chicago Journal of International Law*, 246
[580] Article 8(2) (b) (iv) Rome Statute
[581] Roger O'Keefe "Protection of Cultural Property under International Criminal Law" (2010) 11 *Melbourne Journal of International Law*, 1
[582]*Supra*, note 328 at 293
[583] Article 1(a), Agreement on the Civilian Protection Component of the International Monitoring Team, 27 October 2009

2.7.11 Precautions in Preparing and Launching Attacks

Neither Additional Protocol II nor the Rome Statute of the International Criminal Court has set-out rules on precautions. However, the omission does not suggest that the obligation to take proper and necessary precautions is not applicable to internal armed conflicts. This is because according to the *Galic* case, it applies through the rules of distinction and proportionality.[584] Therefore, regulations on precaution may be inferred from the provisions on the protection of civilian population, and from the proscription of targeting civilians. It is also derived from the principle that 'the civilian population and individual civilians shall enjoy the general protection from the dangers of hostilities.[585] In addition, provisions on precautions are also located in relevant conventions applicable in internal armed conflicts,[586] and in customary international law.[587] For instance, the United States has noted that under customary international law, parties in hostilities must take all feasible precautions, bearing in mind - military and humanitarian factors, to mitigate incidental death, harm and destruction to civilians' properties.'[588]

There is also a practical example on this by states and non-states armed groups involved in non-international armed conflicts. For example, in the course of the Spanish civil war, the United Kingdom expressed that 'reasonable care must be taken in targeting… military objectives to ensure that no civilian population within the neighbourhood is carelessly bombed.[589] Likewise, the League of Nations suggested that 'any attack on legitimate target must be conducted in a manner that civilian population around the area are not negligently bombed.[590] Similarly, in recent years, the 2009 Code of Conduct of the

[584] *Prosecutor v. Galic*, IT-98-29-T, Judgment and Opinion, 5 December 2003, Para 58
[585] Article 13(1) Additional Protocol II
[586] Article 3(10) Convention on Certain Conventional Weapons, Amended Protocol II
[587] Rule 15 Customary International Humanitarian Law
[588] US Department of State, Report to Congress on Incidents During the Recent Conflict in Sri Lanka (2009) 7
[589] UK Prime Minister, House of Commons Debates, 21 June 1938, cited in *Tadic* Decision on Interlocutory Appeal on Jurisdiction, Para 100
[590] Quincy Wright "The Munich Settlement and International Law" (2017) 33(1) *Cambridge University Press,*12

Taliban of Afghanistan incorporated a declaration that 'the Provincial and Local authorities, Group leaders and all other Mujahideen should take maximum measures to avoid civilian deaths and casualties, and the loss of their vehicles and other objects.'[591] In its Eid message 2011, the Taliban announced that 'the Mujahideen must take all appropriate measures to protect civilian lives and properties in accordance with their religious responsibility...'[592] However, Juergen noted that the Taliban continues to use improvised explosive devices, which the United Nations mission in Afghanistan observed concerning the Eid message, leads to a large percentage of civilian fatalities.[593] In Nigeria, Boko Haram also utilizes improvised explosive devices (IEDs), as well as car bombs, and suicide bombers to attack and kill civilians in places occupied by civilians such as markets, worship places, schools and public institutions.[594]

Another factor to consider is the commitment to put in place precautionary measures which also are found in ad hoc arrangements reached between the warring parties. In a 2002 mutual agreement reached between the Government of Sudan and the SPLM, the parties 'reiterated their responsibility under international law, as well as Common Article 3 of the Geneva Conventions, to take constant care to protect civilian population and their properties against the dangers resulting from hostilities.' This extends to taking every precautionary measure feasible to avoid incidental loss of civilian life, harm to civilians, as well as destruction of civilian properties.'[595]

Accordingly, provisions of higher specificity have been deduced from the general rule that feasible precaution should be adopted. First, relevant actors must 'do everything feasible

[591] Article 46 The Taliban Code of Conduct 2009, reproduced and translated in English in Kate Clark "The Layla: Calling the Taliban to Account" (2011) *Afghanistan Analysts Network*, 22
[592] The Guardian "Mullah Omar warns Taliban against hurting Afghan Civilians," Available at: https://www.theguardian.com/world/2011/nov/04/mullah-omar-warns-taliban-afghan-civilians. (Accessed May, 2020)
[593]JuergenKleiner "How many Lives do the Taliban Have?" (2014) 4 *Journal of Diplomatic Statecraft*, 708
[594] James A Falode "The Nature of Nigeria's Boko Haram War, 2010-2015: A Strategic Analysis" (2016) 10(1) *Perspectives on Terrorism*, 41
[595] Agreement between the Government of the Republic of Sudan and the Sudan Peoples' Liberation Movement to Protect Non-Combatant Civilians and Civilian Facilities from Military Attack, 10 March 2002, Article 1

to confirm that the objectives to be targeted are military objectives.'[596] Second, warring parties must do everything feasible to certify whether or not the attack is disproportionate.[597] These provisions were both derived from other regulations, specifically the proscription on attacks against civilian objects and the proscription on disproportionate attacks. In essence, they are of customary status.[598] Consequently, in the framework of the United States war with Al Qaeda which organs of the US administration have considered it as non-international armed conflict, the legal Adviser to the State Department states that 'great care is taken to stick to these rules of distinction and proportionality both in planning and execution, to ensure that only legitimate objects are attacked and that consequential damage is maintained to a bare minimum.'[599]

Third, 'an attack must be cancelled or deferred if it becomes clear that the target is not a legitimate objective or is covered by special protection, or if the anticipated harm to civilians as well as the anticipated damage to civilian properties would be excessive with regards to the anticipated direct military advantage.'[600] This provision is derived from the two earlier principles of distinction and proportionality that prohibits attacks against civilians and civilian property and disproportionate attacks. Equally, this too has attained customary status.[601]

Fourth, 'when a rational choice between methods or means employed in an attack exits for achieving similar military advantage, the method or means anticipated to mitigate the harm to civilians and civilian properties must be selected.'[602] Here, factors to be considered include considerations such as 'timing of an attack' as well as 'the approach of the

[596] See in the framework of Article 7(a) of cultural property, Second Protocol to the Hague Convention on Cultural Property
[597] *Ibid*, Article 7 (b) & (c)
[598] Rules 16 and 18 Customary International Humanitarian Law
[599] HH Koh "The Obama Administration and International Law": Speech at the Annual Meeting of the American Society of International Law, 25 March 2010
[600] *Supra*, note 574 at 25
[601] Rule 19 Customary International Humanitarian Law
[602] *Supra*, note 574 at 25

attack.'[603] Thus, the capabilities of the warring parties have to be taken into account, because just like Boko Haram armed group, not all parties to armed conflicts are able to employ thorough evaluations. Fifth, 'when a logical choice is obtainable between some military objectives for achieving similar military advantage, the objective anticipated to mitigate the harm to civilians and civilian properties must be selected.'[604] These two rules are clear evidence of the principle on precaution, specifically minimizing civilian death and destruction of civilian properties. They too are of customary status.[605]

Sixth, an 'effective and prior notice must be given whenever circumstances permit.'[606] Here, circumstances are connected to 'cases of assault, where surprise could be of the essence.'[607] This, also, has reached customary status.[608] The notice should, if the situation so permits, give sufficient time for the civilian population to take adequate and relevant measures, for instance, to move out of the area. The obligation to give prior notice has been a norm of internal armed conflict since the period of the Lieber Code.[609]

2.8 Arbitrary Treatment of Civilians in the Boko Haram Conflict

Since the beginning of the Boko Haram insurgency, millions of inhabitants of the North-Eastern region of Nigeria that has served as the hotbed of the conflict have been forcefully displaced, argues Salleh et al.[610] Observers have offered conflicting figures of the victims who are displaced forcefully. For example, while Maiangwa et al.,[611] and Alobo and

[603]RewiLyall "Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligation of States" (2008) 9(2) *Melbourne Journal of International Law*, p 313
[604]*Supra*, note 574 at 25
[605] Rules 17 and 21 Customary International Humanitarian Law
[606] See generally in the framework of Article 6(d) cultural property, Second Protocol to the Hague Convention on Cultural Property
[607] Article 26 Hague Regulations, 1907
[608] Rule 20 Customary International Humanitarian Law
[609] Article 18 of the Lieber Code Instructions for the Government of Armies of the United States in the Field of 24th April 1863
[610]SallehMohdAfandi, AbdullahiAyoade Ahmad and Sobia Jamil "Forced Displacement and the Plight of Internally Displaced Persons in Northeast Nigeria" (2018) 1 *Humanities and Social Science Research*, 46
[611]Alobo, Eni and SyndaObaji "Internal displacement in Nigeria and the case for human rights protection of displaced persons" (2016) 51 *Journal of Law Policy and Globalization*, 26

Obaji[612]maintained that about 2 million persons have been displaced as a result of the conflict, Omoroghomwan[613] and, Eme[614] noted that over 4 million persons have been forcefully displaced as a result of the conflict. According to UNCHR, the displacement of innocent civilian populations has given rise to the worse humanitarian crisis in the history of Nigeria since the Civil War (1967-1970).[615] There are two issues arising from this: first, the government did not take the precautionary steps before displacing the people. Second, they are being abused by the very people that are meant to protect them in the IDP camps.

Furthermore, Nigeria's security forces have reportedly engaged in arbitrary detention of civilian population under the guise of fighting insurgency.[616] Usually, when security forces engage in this kind of unprofessional acts, its training processes requires close scrutiny, argues Solomon.[617]Weeraratne noted that the security forces in its desperate attempt to contain the group have instead 'mounted aggressive pursuit and crackdown of civilian population."[618]Agbiboa observed that the state has unleashed excessive force on innocent civilians, noting that such actions are not only counter-productive but abusive of the fundamental human rights of the citizens.[619] While the above positions are true, the state has hurriedly enacted the Terrorism Prevention Act (2013) that legalised its arbitrary detention of mere suspects up to a period of 90 days in the first instance and another 90 days while

[612]Maiangwa, Benjamin, and Daniel Agbiboa "Why Boko Haram kidnaps women and young girls in north-eastern Nigeria" (2014) 3 *Conflict Trends*, 51
[613]Omoroghomwan, Osayemwenre Blessing Usman Isahya'u and AliyuAbubakarBafeto "Politics, Insecurity and Internally Displaced Persons (IDPS) In North-Eastern Nigeria, 2009-2015: A Critical Review" (2017) 3(1) *Inquiry Journal*, 87
[614]Eme, Okechukwu Innocent Paul OkwuchukwuAzuakor, and C. C. Mba "Boko Haram and Population Displacement in Nigeria" (2018) 8 (1) *Practicum Psychologia*, 77
[615] ICRC Addressing Internal Displacement in Times of Armed Conflict and Other Violence, June 2020; available at: https://www.icrc.org/en/publication/0867-internally-displaced-humanitarian-response-internally-displaced-people-armed (Accessed 2020-09-10)
[616]Agbiboa, Daniel "(Sp) Oiling Domestic Terrorism? Boko Haram and State Response" (2013) 25(3) *Journal of Peace Review*, 431
[617] Solomon, Hussein. "Counter-terrorism in Nigeria: responding to Boko Haram" (2012) 157(4) *The RUSI Journal*, 6
[618]SuranjanWeeraratne "Theorizing the Expansion of the Boko Haram Insurgency in Nigeria" (2017) 29(4) *Terrorism and Political Violence*, 610
[619]Agbiboa E Daniel "Peace at Daggers Drawn? Boko Haram and the State of Emergency in Nigeria" (2014) 37(1) *Studies in Conflict and Terrorism*, 41

investigation continues. One may argue that such a law is against the principles of other international treaties which the country has entered into that recognised the personal liberty of citizens and their rights including right from arbitrary detention and mass arrest.

2.8.1 Pre-judicial Killings

The requirement of international humanitarian law to the effect that civilians not directly participating in the conflict should be protected by combatants have been violated by both sides to the conflict. For example, the insurgent group has taken responsibility for the numerous attacks on children, mothers and aged, an act that directly violates Article 4(3) of Additional Protocol II. According to Amnesty International, in 2015, it attacked Bagacommunity of Bornu State and massacred 2,000 civilians among whom are children and women.[620] Beside the loss of lives, properties including shops, shelter, and schools etc. on which the community depends has not been spared. On its own, as reviewed above, the destruction of the means of livelihood of non-participating civilian population by armed groups in non-international armed conflicts violates IHL rules. No doubt, these acts constitute egregious violations of international humanitarian law.

While it is understandable that the group which has shown itself not to commit to IHL standards, and thus, continue to attack civilian populations and killing in thousands, it is rather unfortunate that the security forces which swore an oath to defend the population have also join in this barbaric which practice of killing armless civilians in the name of fight against Boko Haram. Apart from the numerous local and international media reports pointing to the abuse of privileges by the security forces, Amnesty International has on various occasions indicts the armed forces and police for human rights violations and IHL.[621] According to Ekwueme, in clear contravention of the "principles of distinction,

[620] Amnesty International Report 2013; available at: https://www.amnesty.org/download/documents/afr4485292018english.pdf (Accessed 2020-09-09)
[621] Amnesty International Report 2014/2015, available at: https://www.justice.gov/sites/default/files/pages/attachments/2015/05/19/amnesty-international_2014_nigeria.pdf (Accessed 2020-09-09)

proportionality and military necessity, the armed forces has been reported to have bombed a village, killing civilians, used firearms where there was no imminent threat of death or serious injury."[622]Among various cases of prejudicial executions were the unfortunate killings of 640 people behind the University of Maiduguri by the soldiers after the insurgent group attacked the Giwa Barracks.[623] Such a practice when committed against helpless civilian populations is considered as War Crimes by the Statutes of the International Criminal Court as seen in the Rwanda and the former Yugoslavia. In response to numerous cases of these violations, the Office of the Prosecutor to the International Criminal Court has called upon the international community to treat the conflict within the understanding of non-international armed conflict.[624] The same report argued that since about 2013, crimes committed against the civilian population in the North-Eastern region of Nigeria should henceforth be treated within the scope of article 8(2) (c) and (e) of the statute.[625]

While the different forms of violations analyzed above have attracted the attention of scholars, violations related to sexual violence have not receive equal attention. Even those who attempted to study sexual violence in relations to the armed conflict between the Nigerian state on the one hand and Boko Haram on the other hand did not go deep into the details as with other forms of violations. For example, Sverdlov contended that the case of sexual violence in the North Eastern part of Nigeria have not amounted to any serious form of violation akin to the cases in other parts of the world or in other conflicts.[626] While it is arguable that sexual violence in North Eastern part of Nigeria cannot be compared to the case against the Yazidis in the Middle East where ISIL have committed all the three forms of

[622]Ekwueme, Celestine "A Critical Evaluation of The Nature Of Boko Haram Armed Conflict In Nigeria: An International Criminal Law Perspective" (2016) 1 *African Journal of Criminal Law and Jurisprudence*, 148
[623] Nigeria: No Justice for the 640 Men and Boys slain by Military following Giwa Barracks attacks, available at: https://www.amnesty.org/en/latest/news/2016/03/nigeria-no-justice-for-the-640-men-and-boys-slain-by-military-following-giwa-barracks-attack-two-years-ago/ (Accessed May 2020)
[624] ICC Report: Situation in Nigeria, available at: https://www.icc-cpi.int/iccdocs/PIDS/docs/SAS%20-%20NGA%20-%20Public%20version%20Article%205%20Report%20-%2005%20August%202013.PDF (Accessed July 2020)
[625]*Ibid*
[626]*Supra*, note 237 at 334

violations associated to sexual violence (war crime, crime against humanity, and genocide), this conclusion that suggest the absence of serious sexual violations betrays the victims of Boko Haram armed conflict.

2.8.2 Systematic abuse of Women and girls in Armed Conflicts

Until recent times, the consequences of armed conflicts on women, girls and young children received very little attention. However, since the establishment of the International Criminal Tribunals for Rwanda and Yugoslavia, there has been a growing awareness and compassion in both public consciousness and legal and political elites, of the magnitude and need to address the rape of women and girls in armed conflicts. Commenting on the prevalence of rape during conflicts, Maj. Gen. Patrick Cammaert, former Commander of the UN Peacekeeping missions in Democratic Republic of Congo, expressed that 'it is now more dangerous to be a woman than to be a soldier in modern conflict.'[627] The rape of women and girls has been employed as an instrument of terror in hostilities since the beginning of wars. Catherine noted that it seems to go through about three principal phases: First, rape is a routine and expected reward to the conquerors. Secondly, rape takes place due to indiscipline of the military forces. Third, rape happens as a military method to weaken the opposition.[628]

Rape has been used as a tool of war for centuries. In the systematic rape of Nanking in 1937, Japanese forces massacred about 300,000 Chinese, and at least 20,000 women and girls were raped.[629] In the Second World War, sexual humiliation and rape were routinely employed against the Jewish population. Rape occurred in prison camps, including brothels set up by the German forces.[630] Similarly, Bosnian women were intentionally raped and

[627] "Rape in war is Common, Devastating and Too often Ignored," available at: https://journals.plos.org/plosmedicine/article/file?type=printable&id=10.1371/journal.pmed.1000021 (Accessed April 2020)
[628] Catherine MacKinnon, Rape: On Coercion and Consent, In Katie Conboy, Writing *on the Body: Female Embodiment and Feminist Theory* (Columbia University Press, 1997)
[629] The Rape of Nanking 1937-1938 300,000 Deaths, available at:https://www.historyplace.com/worldhistory/genocide/nanking.htm (Accessed April 2020)
[630] Beverley Chalmers "Jewish Women's Sexual Behavior and Sexualized Abuse during the Nazi Era" (2015) 24(2) *Canadian Journal of Human Sexuality*,184

impregnated as a part of ethnic cleansing,[631] and during the conflict for Bangladesh independence in 1971 from Pakistan, a staggering number of 200,000 women and girls are projected to have been raped.[632] Some of these women and girls died as a result of gang rape, while others committed suicide. In the Rwandan genocide of 1994, rape was used in a widespread fashion,[633] and rape has been utilized in the current conflicts in Darfur[634] and the Congo[635] since 2000. In the DRC, where the incidence of rape is portrayed as the worst in the world, with a single estimate putting the case of rapes in 2011 alone at 433,785.[636] Although the ICTY described rape as a crime against humanity, and as result opposed the conventional understanding of rape as an inevitable consequences of war. Today, women's' bodies are becoming battlegrounds or territory to be conquered.[637] In Nigeria, the Boko Haram armed group has kidnapped more than 4000 women, girls and young children in northeast Nigeria since 2009, and perpetrated myriad of physical and mental abuses against them.[638]

While the various forms of violations in the Boko Haram armed conflict have attracted the attention of scholars, violations related to sexual violence have not receive equal attention. Even those who attempted to study sexual violence in relations to the armed conflict between the Nigerian state on the one hand and Boko Haram on the other hand did not go deep into the details as with other forms of violations. For example, Sverdlov contended that the case of sexual violence in the North Eastern part of Nigeria have not

[631]Todd A Salzman "Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethnic Responses to Rape Victims in the Former Yugoslavia" (1998) 20(2) *Human Rights Quarterly*, 348
[632]NayanikaMookherjee "The Raped Women as a Horrific Sublime and the Bangladesh War of 1971" (2015) 20(4) *Journal of Material Culture*, 379
[633]Leah Woolner, Myriam Denov and Sarilee Kahn "I asked myself if I would ever Love my Baby: Mothering Children Born of Genocidal Rape in Rwanda" (2018) 25(6) *Violence against Women*,703
[634] John Hagan, Wenona Richmond and Alberto Palloni "Racial Targeting of Sexual Violence in Darfur" (2009) 99(8) *American Journal of Public Health*, 1386
[635]Stacy Bandwell "Rape and Sexual Violence in the Democratic Republic of Congo: A Case Study of Gender based Violence" (2014) 23(1) *Journal of Gender Studies*, 45
[636]Forty-Eight Women Raped every Hour in Congo, Study finds; available at: https://www.theguardian.com/world/2011/may/12/48-women-raped-hour-congo (Accessed April, 2020)
[637]Patricia Hynes "On the Battlefield of Women's Bodies: An Overview of the Harm of War to Women" (2004) 27(5) *Women's Studies International Forum*, 431
[638]World Report 2015 – Nigeria, available at:https://www.hrw.org/world-report/2015/country-chapters/nigeria (Accessed April 2020)

amounted to any serious form of violation akin to the cases in other parts of the world or in other conflicts.[639] While it is arguable that sexual violence in North Eastern part of Nigeria cannot be compared to the case against the Yazidis in the Middle East where ISIL have committed all the three forms of violations associated to sexual violence (war crime, crime against humanity, and genocide), this conclusion that suggest the absence of serious sexual violations betrays the victims of Boko Haram armed conflict.

In addition, literatures on sexual violations in the North East were overtly one-sided. In this category are works of Zenn and Pearson,[640]Maiangwa and Agbiboa,[641] Bloom and Matfess[642]Oriola[643] among others. They treat the subject of rape and sexual violence squarely within the insurgent group. While the temptation to reduce the violation associated to sexual violence to the insurgent group can be high considering the various cases of kidnappings and all, scholars must not shy away from the various cases of violations associated with the security forces that are meant to protect the victims. It is the conviction of the researcher that a nuanced study is needed to fill in this huge gap in other to have a balanced understanding of the situation in a region that has attracted global attention for the wrong reason. It is within this angle that the usefulness of the present study can be ascertained. This and other forms of violations will be considered to ascertain the challenges that continue to inhibit the effective enforcement of international humanitarian law in Nigeria's war against Boko Haram armed conflict.

[639]*Supra*, note 237 at 334
[640]Zenn Jacob, and Elizabeth Pearson "Women, Gender and the evolving tactics of Boko Haram" (2014) 5(1) *Journal of Terrorism Research*, 46
[641]Maiangwa, Benjamin and Daniel Agbiboa "Why Boko Haram Kidnaps Women and Young Girls in North-Eastern Nigeria" (2014) 3 *Conflict Trends*, 51
[642] Bloom, Mia and Hilary Matfess "Women as Symbols and Swords in Boko Haram's Terror" (2016) 6(1) *Prism*, 104
[643]Oriola, Temitope "Unwilling Cocoons": Boko Haram's War against Women" (2017) 40(2) *Studies in Conflict and Terrorism*, 99

2.9 Enforcement of IHL through the International Criminal Court and the Hybrid Tribunals

The challenge of enforcing international humanitarian law, especially in Africa has largely been limited by multiple factors, of which weak states and less democratic political environments contributes to the question at hand. The continuous occurrence of conflicts has exposed a sizable percentage of its civilian population to gross violations such as genocide, inter-ethnic conflicts, war crimes, sexual violence, massive killings and the rest of all forms of abuse.[644]Although, Robin Gneiss argued that most of the heads of states or individuals who have been reported to have committed atrocities, are high level citizens who in most instances are close to the corridors of power.[645]

In most cases, the domestic courts do not have the mechanism to withstand pressure from the political elite. This way, justice is presented to suit the case of the state or its friends. This explains why international or hybrid courts are better placed to dispense justice.[646] Moreover, atrocities committed against civilians constitute international crimes that can at best be treated in international courts.[647] Even with this development, the international courts have not been effective in dispensing justice due to certain challenges beyond its power, such as lack of states cooperation in prosecuting offenders, or provide documentary evidence, and issues of sovereignty etc.[648] Nonetheless, there are court decisions and ongoing cases that will be the focus of the following reviews.

According to Cassese, the creation of the United Nations International Criminal Tribunal for Rwanda otherwise known as ICTR became eminent when it was clear that the

[644]Cilliers, Jakkie, and Kathryn Sturman "The Right Intervention: Enforcement Challenges for the African Union" (2002) 11 (3) *African Security Studies*, 28
[645]Geiss, Robin. "Armed Violence in Fragile States: Low-intensity Conflicts, Spill over Conflicts, and Sporadic Law Enforcement Operations by Third Parties." (2009) *International Review of the Red Cross, 91*
[646]Nouwen M.H Sarah "Hybrid Courts-The Hybrid Category of a New Type of International Crimes Courts" (2006) 2(2) *Utrecht Law Review*,190
[647] David Luban "A Theory of Crimes Against Humanity" (2004) 29 *Yale Journal of International Law,*85
[648]Jalloh Charles Chernor "Africa and the International Criminal Court: Collison Course or Cooperation" (2012) 34(2) *North Carolina Central Law Review*, 203

international system could no longer control the egregious violations of IHL.[649] However, the legality or even legitimacy of the tribunal soon became a source of worry as many questioned its legality.[650] However, trial began in 1997, and by 2009, "79 suspects have been arrested, 23 of whom are on trial, 8 are awaiting trial, 16 are serving their sentences in Italy and Mali, 6 have been acquitted, and 7 are awaiting the outcome of their appeals."[651] While many observers argued that the tribunal was unable to provide justice because of the pressure from the government of the day, it can also be said that the tribunal pioneered the provision of justice at the international level. Until 2009, the tribunal set up in 1997 could only deliver judgment in the most popular *Bagosora*case, [652]also known as the "mastermind" of genocide in the country of Rwanda. In the end, *Bagosora*and three others were convicted of war crimes, and crimes against humanity based on records of egregious violations of IHL during the Rwanda conflict of 1994.[653] However, many legal practitioners perceived the later acquittal of all the four accused of conspiracy to commit genocide to mean that indeed genocide was not committed.[654] The challenge of justice dispensation has thus hindered the efficiency of the tribunal in dispensing justice and fairness.

Bangamwabo argued that the tribunal was selective in its prosecution of the accused persons. The legitimacy of their decisions was queried by popular opinion in Rwanda and the international community as a whole.[655] The prosecution was bias against the Hutu ethnic group and even when incriminating evidence presented against Tutsis, the tribunal decided to

[649]Cassese, Antonio, Paola Gaeta, and John RWD Jones, *The Rome statute of the International Criminal Court: A Commentary* Vol 1 (Oxford University Press, 2002)
[650]MutuaMakau "Never Again: Questioning the Yugoslav and Rwanda Tribunals" (1997) 11(1) *Temple International and Comparative Law Journal*, 167
[651]Byron Dennis "Hate Speech and the Rwanda Genocide: ICTR Jurisprudence and Its Implications" *Protecting Humanity* (Brill, 2010) 53
[652]*Prosecutor v. Bagosora* ICTR, 98-41 (2008) See also, Akhavan, Payam. "The International Criminal Tribunal for Rwanda: The politics and pragmatics of punishment" (1996) 90 (3) *The American Journal of International Law* 501
[653]Zacklin, Ralph "Failings of Ad Hoc International Tribunals" (2004) 2 *Journal of International Criminal Justice*,541
[654] Elena Baca "ICTR in the Year 2011: Atrocity Crime Litigation Review for the Year 2011" (2013) 11(3) *North-western Journal of International Human Rights*, 212
[655]Bangamwabo, Francois-Xavier "The Implementation of International Criminal and Regional Human Rights Instruments in the Namibian Legal Framework" (2009), 165

remain silent. Thus, the tribunal was criticized for being what one author described as providing "victor's justice."[656]Another major institution in respect to gross violations of IHL is the Special Court for Sierra Leone (SCSL), which tried those accused of grossly violating IHL and committed war crimes. After trial which was adjudged to be fair, five leaders of the Revolutionary United Front (RUF) were indicted and many others were sentenced to some years' imprisonment. Members of the Armed Forces Ruling Council (AFRC) were also convicted and sentenced to many years behind bars.[657]

The same challenge which constrained the effective dispensation of justice by the Tribunal for Rwanda resurfaces with similar effect on the case in Sierra Leone; the government of the day had overwhelming influence over the rulings of the tribunal. In some cases, those who ought to be imprisoned have since gone underground and the special court remains largely helpless in such situations. Praising the outcome of the tribunal, Patricia Sellers, argued that against all odds, the tribunal facilitated the "prosecution and bringing to justice of those responsible for acts of genocide and other violations of international humanitarian law."[658] One might argue that perhaps the tribunal has opened the doors for other cases of violations of IHL to be investigated and prosecution of same.

Similarly, the trial of the former president of Liberia, Charles Taylor is one the most controversial cases in international criminal court. The SCSL had indicted Taylor but he fled Liberia and was granted asylum in neighboring Nigeria.[659] But once the atmosphere was tense and Taylor was extradited back to Sierra Leone to face Trial. ChachaBhoke contended that it is worthwhile to note that during the war in Sierra Lone, Charles Taylor was accused of

[656]Schabas, William A. *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006)
[657]Kendall Niles "SCSL Appeals chamber upholds judgement for Charles Taylor" (2013) *The Human Rights Brief*, 3
[658]Sellers, Patricia Viseur *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation* (2007) 1 Women's Human Rights and Gender Unit, 4
[659]Bhoke, Chacha. "The trial of Charles Taylor: Conflict Prevention, International Law and an Impunity Free Africa" (2006) Institute for Security Studies, 20

serious cases of egregious violations of IHL such as the use of child soldiers and force marriages. No matter the deficiency of the SCSL and the various cases presented before it, it has recorded huge successes. Glasius, Marlies, and Timled in this line of thought when they presented the success of the SCSL to include its pioneer role in ensuring that egregious violations if IHL specifically in regard to the conscription of child soldiers were handed ruling.[660]

Nowhere has this been clearly articulated than in the words of Giulia Bigi "*the first time ever that an international court had ruled on charges relating to child soldiers or forced marriages, and that an international court had delivered a guilty verdict for the military conscription of children*."[661]*BBC News* joined in the trumpeting the precedential value of the case against Charles Taylor.[662] However, some scholars argued whether the change of venue has tempered with the dispensation of justice and met with the expectations of the public.[663]

No doubt, the venue was moved to The Hague on grounds of security knowingly well that Charles Taylor was reputable for sponsoring mercenaries in both Sierra Lone and Liberia, the substance of the judgment in his case remains valid and the legality as well as the legitimacy of the courts should not be the primary concern in the case.[664]

In the case against Charles Taylor, the idea of individual responsibility becomes pronounced. In the *Prosecutor v Charles Taylor* case, the court noted Article 6(1) of the Statute of the Special Court for Sierra Leone which explicitly contended that "A person, who planned,

[660]Glasius, Marlies and Tim Meijers "Constructions of legitimacy: the Charles Taylor trial." (2012) 6 *International Journal of Transitional Justice*,229

[661]Bigi, Giulia "The decision of the special court for Sierra Leone to conduct the Charles Taylor trial in The Hague" (2007) 6 (2) 303

[662] Ex-Liberia President Charles Taylor in bid to Leave UK Prison. Available at: https://www.bbc.co.uk/news/uk-27918717. (Accessed September, 2017)

[663] Charles ChernorJalloh "Special Court for Sierra Leone: Achieving Justice?" (2011) 32(3) *Michigan Journal of International Law*,396

[664]*Supra,* note 192 at p1In the explanations regarding the trial of Charles Taylor, Bhoke presented the advantages of the trial in the following words: "The trial assures to be remarkable test case for or against the culture of impunity by political leaders in Africa. It highlights the fact that rule of law and justice will always prevail. In this regard, the trial marks an essential step in the administration of international criminal justice. It further reiterates the responsibility of the international community to hold liable those who perpetuate outrages and contravene international humanitarian law and human rights; no matter how rich, powerful or feared they might be

ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime… shall be individually responsible for the crime."[665]

It is important to note that the international criminal court (ICC) has the powers to investigate and prosecute issues relating to gross violations of IHL. As early as 1998, the Rome Statute of the ICC has been adopted by the UN in respect of the formation of the ICC which became effective only in 2002 "after the magic number of 60 ratifications was reached on 11 April 2002."[666] Subsequently, the crimes over which the court exercises jurisdiction were later adopted and since then it has continued to entertain serious cases of violations of IHL.

Of all the regions of the world, the ICC has decided more on violations of IHL on the African region than any other.[667] Yet, the judgment of the ICC has always provoked outrage over what one scholar describes as "bias judgment"[668] against Africans states. Whatever the position of African leaders on ICC, it has the power to investigate and prosecute cases of serious violations of IHL, but "only when national jurisdictions are unwilling and/ or unable to do so."[669] At best, as argued by Marisa Bassett, the ICC performs a complementary role that further confirms the pessimistic views of its critics who stated that "prosecution of international crimes rests squarely on domestic legal frameworks."[670] In any case, the International Criminal Court and the hybrid tribunals have contributed in the enforcement of grave violations of international humanitarian law. The seminal *Tadic* case is one example of significant contribution of the ICTY in this field.

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[665] *Ibid*3
[666] *Supra*, note 182 p78
[667] Brendon J Cannon, Dominic R Rkalya and BosireMaragia "The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative (2016) 2(2) *African Journal of International Criminal Justice*, 6
[668] *ibid* p 9
[669] Kai Ambos and Ignaz Stegmiller "Prosecuting International Crimes at the International Criminal Court: Is there a Coherent and comprehensive Prosecution Strategy?" (2013) 59(4) *Crime, Law and Social Change*, 415
[670] Bassett, Marisa R. "Defending International Sentencing: Past Criticism to the Promise of the ICC." (2009) 16 (2) *Human Rights Brief*,22

2.10 Conclusion

Although customary international law is still developing, there exist yet some differences in the law applicable to international and non-international armed conflicts. This difference is especially noted in relation to the conventional rules applicable to armed conflicts. It is therefore important to identify the nature of an armed conflict, and this will in turn determine the specific rules that apply to the conflict. This chapter has identified and explained the tests by which the two types of conflicts can be identified.

The classification of non-international armed conflicts is specifically very complex. There are some degrees of uncertainty as well as strong legal opinion on virtually all aspect from the meaning of 'armed conflict' (which also includes international armed conflicts). Therefore, an armed conflict which seems, at first glance, to be non-international, may become international armed conflict in two possible ways. First, conflict against colonial domination, alien occupation, and racist regimes are generally regarded as international in character. Second, the most classical way in which a conflict a non-international armed conflict will metamorphose into an international armed conflict is through an intervention by an external state. This method is divided into two: through military intervention by an external state and external state control over a non-state armed group. With regards to both types of intervention, the factual reality will prove decisive.

Recently, a third type of armed conflict have been discovered, one that is characterized as transnational armed conflict. Advocates of this type of conflict hold the view that such conflicts are neither international armed conflict because they do not occur between a state and a non-state armed group, nor they are non-international armed conflict because they cross a state boundary. However, such conflicts are at the very least, a subset of non-international armed conflicts. Conventional 'internal' armed conflicts such as the case of Boko Haram,

have in recent years had some sort of cross-border element, with armed group located on the territory of a proximate state, or their kind of 'overspill.'

Yet, in reality the serious problem is not the conflicting framework of legal classification of armed conflicts, but the blatant disregard to comply with even the basic consideration of humanity during hostilities. The overwhelming majority of grave violations of IHL could be avoided if States only applied the basic rules of non-international armed conflict. However, that does not mean that there is no need to distinguish between international and non-international armed conflicts. While effort was made to study the enforcement of international humanitarian law in Nigeria, it did not cover the experience in North Eastern region focusing on effective enforcement of IHL rules to the ongoing armed conflict in the region. For example, the many literatures have explained at general level the changing face of idea and practice of IHL and human rights in general and how the international system has continued to reflect this changing dynamics. However, there is still scarceness of materials on the level of enforcement of IHL at the State level, especially in the Boko Haram armed conflict. The generalized approach has proven to be unclear and unable to provide cogent answers to the challenges of effective enforcement of IHL rules in the Boko Haram conflict. Also, most of the available literatures focus more on non-state actors as the only party that violate IHL rules, especially as it relates sexual violence in the Boko Haram conflict. The idea that state forces have also perpetrated some grave violations, particularly sexual violence is largely unpopular in the literatures.

It is thus, the conviction of the researcher that a nuanced study is needed to fill in this huge gap in other to have a balanced understanding of the situation in a region that has attracted global attention for the wrong reason. It is within this angle that the usefulness of the present study can be ascertained. This and other forms of violations will be considered to

ascertain the challenges that continue to inhibit the effective enforcement of international humanitarian law in the Boko Haram armed conflict.

Chapter Three

Research Methodology

3.0 Introduction

The research deals with the critical analysis of the contemporary challenges of enforcing International Humanitarian Law (IHL) in Nigeria with specific focus on the Boko Haram conflict, thus, I adopted doctrinal/field based methodology. The adoption of this methodology is premised on the fact that while very few scholarly literatures have been written on the Nigerian Boko Haram conflict, - there is, arguably no literature, as at the time of conducting this research, specifically on the challenges facing the effective enforcement of IHL in the ongoing Boko Haram armed conflict. The field methodologyinvolves person-to-person interviews and listening to the main actors, players and scholars in the field.On the other hand, the doctrinal approach is aimed at ascertaining existing international rules regulating armed conflicts, especially those that principally relate to this study. This is also withtheview to ascertain the specificlegal instruments that apply in conflict situation – international and non-international armed conflicts, including extraterritorial conflicts. Various international principles and theories were analyzed while considering the arguments for and against.

This chapter outlines the research philosophy, the ontological and epistemological approach, the data collection process, the research findings and the analytical method used in the study. As a piece of socio-legal research, it seeks to explore and assess the challenges that continue to inhibit the effective enforcement of international humanitarian law in the Boko Haram armed conflict. The research used an empirical legal research that entails a mixed method of empirical and doctrinal research approaches. Most traditional legal research involves a doctrinal method which is primarily concerned with a detailed and systematic analysis of the rules governing particular legal issue(s), the relationship between the

rules,thedifficult aspects of the law, and perhaps future developments.[671]However, when a piece oflegal research relates to social phenomena, such as in this study, the doctrinal method of research is usually supplemented with empirical data.The aim of collecting empirical data in this study is to produce reliable notion which best explain the relationships between the social phenomena and the legal doctrine. It generally helps in producing a unique, original and more reliable research output on a specific subject matter such as the threat posed by Boko Haram and the willingness/ability of Nigeria in responding to the threat.

The research uses qualitative data sources, which include field observational data, memoir, and most importantly, an in-depth interview with a carefully purposive and theoretical sampled study population in Nigeria. It also uses primary legal sources for the doctrinal component of the research, such as statutes, case law and customary international law, as well as other existing secondary data including textbooks, law periodicals, journal articles, government achieves, and other relevant publications. The chapter will discuss the whole process including the rationale behind the methodological approach, data collection techniques, as well as the participants sampling strategies and how that affects the aim and objectives of the research project.

3.1 Research Philosophy: Ontological and Epistemological Approach

The philosophical foundation of this empirical research is based on the Interpretivist philosophy that assumes that a social phenomenon can only be fully understood through the perceptions and experiences of the participant(s).[672] Therefore, to understand the challenges that continue to inhibit the effective enforcement of international humanitarian law, the research sought for answers by underpinning several understandings of the participant's views and the issue at hand. This defines the research's relativists' ontological

[671] Mark Van Hoecke*Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* 1st Ed. (Bloomsbury Publishing, 2013)
[672] Nguyen Cao Thanh and Tran Thi Le Thanh "The Interconnection between Interpretivist Paradigm and Qualitative Methods in Education" (2015) 1(2) *American Journal of Educational Science*, 24

perspective,which suggests that reality has several interpretations, and those interpretations are in themselves a part of scientific knowledge.[673]

Thus, because the complex nature of reality varies from one society to another, knowledge and understanding of a distinct phenomenon can only be construed out of interaction between humans and their world rather than by universal standard of validity.[674]Most of the existing literature in the area of our study defined the challenges for the effective enforcement of international humanitarian law rules from practical and progressive theory, independent of social context. This research's ontological perspective considers it invalid to treat the topic in isolation of the people and the social context. In other words, we cannot objectively answer this complex study phenomena based on universal standard formula.

The interpretivists, also known as constructivists, emphasize the interrelationship between the researcher and the research, thereby encouraging co-construction of meaning.[675] In other words, the researcher in this research is part of the research effort and outcome. This approach, however, does not in any way mean the research will be perforated with political bias or misrepresentation of facts. Rather, the approach simply allows me to become immersed with the data and move beyond the surface level meaning in search for the challenges that continue to mitigate effective enforcement of international humanitarian law rules. In doing so, emphasis has to be given to constructing inferred meanings from the social world as well as people's thoughts and opinions, for the simple reason that reality cannot be known in the same way or better than the people who have lived experience.[676] Distinctively, the experiences of civilians and armed actors living through the conflict in northeastern

[673] Merry-Jo D Levers "Philosophical Paradigms, Grounded Theory, and Perspectives on Emergence" (2013) 3(4) *Sage Open*, 1
[674] Crotty Michael *the Foundations of Social Research: Meaning and Perspective in the Research Process*. 1st Ed (Sage Publications London, 1998) 34
[675] *Ibid*
[676] Cohen Louis, Lawrence Manion and Keith Morrison *Research Methods in Education* 6th Ed (London: Routledge Publishing, 2007)

Nigeria cannot be objectively determined without hearing the voices of the institutions that are saddled with the responsibility of providing security and the victims involved.

The research's interpretivist philosophy and its ontological and epistemological approach will guide the empirical research and it never aimed to replace the legal doctrine nature of the research. That is to say, the research's philosophical empirical piece is particularly explored to figure out the characteristics of a weak state on the enforcement of international humanitarian law for the protection of women and children, and the prevention of genocide, subject to the general discourse and meanings attributed to the legal doctrine itself. The object of legal doctrinal method here is normative in nature, having the combine function of knowledge construction to determine objective solution to the legal problem.Formerly, the goal is to better understand the gap(s) in protection from all sides, how civilians perceive security actors, and what civilians expect from those who are supposed to protect them from harm by providing legal explanation to the legal question(s), using the empirical data.

The essential features of interpretivist methodological guidelines were utilized throughout the research in order to promote reflexivity and thoroughness.[677] For example, participants' thoughts, views and voices will form an integral part of the analysis and its presentation. Meanings are constructed from the data by letting a certain degree of participant's story to visibly feature in the final research outcome. This is to allow the reader to distinguish and make connection between the analytical findings and the original data. The research constructs inferred meanings from the interaction through open-ended questions that focuses on the social processes, lived experiences and thoughts of the participants. The initial sets of open-ended questions includes, for example; even as the military continue in their push against the sect, the preponderance of the group's activity continues to grow by the day.

[677]Robert Elliot and LadislavTimulak "Descriptive and Interpretive Approaches to Qualitative Research" (2005) 11 *Research Methods for Clinical and Health Psychology*, 148

To your knowledge what is the reason behind that? From these initial questions, key elements of the study phenomenon were identified and the findings were used in shaping and defining which data to collect next before the entire findings of the research can be analysed using a flexible coding system which consist conceptualization, categorization, and analysis.

3.2 Data Collection Process: Qualitative data

The data collection process in this research was conducted under clear procedural processes which involved collection and analysis of qualitative data. The research used qualitative data sources to ascertain the thoughts, feelings, and experiences of research participants, which in turn enabled improvement of an understanding of the study phenomena. This includes a flexible use of a variety of techniques such as in-depth personal interviews, focus group interviews, observational data, memoirs, diaries as well as secondary data, to explore and bring together diverse range of data. The qualitative approach used in this research includes continuous collection and analysis of data back and forth until same information starts to circle and the required data is obtained for the justification of the theory.[678] Some of the systematic guideline techniques used in this process includes; purposive sampling and theoretical sampling, open-ended research questions, initial findings and next-question strategy. These techniques were designed and thoroughly followed as discussed below.

3.3 Gaining Access into Research Sites

Gaining entree into the empirical research sites here refers to the identification of the places and sites to explore and the procedure followed in gaining access to such places. The purpose of identifying the empirical research setting and the methods of gaining access into the targeted sites was to create a research design techniques that best explains the systematic and verifiable procedure required of this investigation. The key techniques used include planning, strategizing, and devising safety mechanisms. The process began initially with the

[678]Albine Moser and Irene Korstjens "Series: Practical Guidance to Qualitative Research. Part 3: Sampling, Data Collection and Analysis" (2018) 24(1) *European Journal of General Practice*, 9

identification of the research settings and the best safety mechanisms and ways to go about the investigation. This is especially important because even though some research sites might be theoretically relevant, they could also be practically difficult to explore due to safety reasons; therefore, the sites could not be accessed even when identified as a potential data source. However, in relation to the qualitative empirical data used in this research, those limitations in terms of safety measures will not be a major hindrance to the quality of the data. This is because the goal is to understand the experiences of participants involved in the conflict. This therefore, presupposes that the sites explored in this research are only theoretically determined and not a sample representation of the entire population.

For ethical reasons, the empirical research settings explored by this study was limited to three sites, namely Abuja, Maiduguri, and Yobestates respectively, (Yobe was through Phone due to security concerns).This selection was not designed in an effort to gain a population size sample of the people, but to discover possible source of rich data to understand the phenomena under study. The plan was to sample across a range of issues that will ensure an excellent independent assessment of the study phenomena to its fullest. For this reason, there was no attempt to expand the setting to a wider population. Through a comprehensive pilot study on the country's terrain, the research gained a good idea and guide to site selection. The principal places and sites visited are places with specific public institutions and civil organisations where potential data relevant to the research inquiry will be discovered. Governmental bodies that were contacted including the Nigerian Army, the Office of the Attorney General of the Federation, the Nigerian Human Rights Commission, the Nigerian War College, the National Emergency Management Agency, and the Police Force.

The Federal Capital Territory Abuja, which is the capital city of Nigeria, is home to virtually all the administrative bodies of the country and several non-governmental

organisations including Amnesty International, and International Committee of the Red Cross. The fundamental task involved in the process of exploring these sites includes gaining access to the research area. Considering the fragile security situation in the country, gaining entry into research sites to collect data presented one of the major challenges that the research encountered. Some of the hurdles encountered include high security checks, little or lack of support and co-operation from the participants etc. Fortunately, due to the nature of my research investigation- one that hinges on the international legal obligation vestedon the country to protect life and property of her citizens while prosecuting the war, as well as the reputability of her security forces, I was eventually recognised and granted access to certain targeted sites. The lack of co-operation by some of the participants also had to do with the relatively controversial nature of the research question, which makes some participants reluctant to disclose certain information or deny clearance to enter some internally displaced camps especially, in Borno by security operatives. These challenges were also supplemented through contacts made by networking in the course of the data collection.

Having successfully explored the sites located in Abuja, the research embarked on another trip to other places across the country in order to explore important data sources including civil society organizations, and internally displaced persons camps. Two additional cities; Maiduguri and Yobe, were identified as potential sources of data and relatively secured location to explore important information. Although the two sites were previously marked as vulnerable to terror attacks and other political and social unrests - hence, conducting research in such places is permissible only whenadvised by the FCO (Foreign Commonwealth Office) fortunately, there was relative peace as at the time when the research took place. Even with the confirmation of relative peace in the research sites i visited, the research was carried out with maximum caution and in line with strict ethical standards. Similarly, in order to ensure maximum safety, I remained ever alert to the security situation in the places, and all the

necessary risk assessment were properly approved by the law enforcement agencies. With the safe arrival into the second research sites, I explored few internally displaced camps, victims and/or their families, traditional rulers and medical doctors, as well as the civilian joint task forcewere also contacted and interviewed. With the help of the supporting documents, including my identity as a research student, I was able to establish the necessary relationship with the participants and referral by initials contacts, most of whom are security personnel, activists, NGO's and other relevant agencies.

3.4 Research Participants Sampling

In empirical research terms, sampling refers to the process of selecting individuals or group of research participantsfrom a larger population. The overall purpose of sampling and selection of research participants in empirical study is to gather data fromsection of a population that will be used in the final analysis to represent the entire populace as a whole. In this research, sampling was based on a distinct category of Nigeria's governing bodies, security institutions, academics, independent non-governmental organizations, and activists. These distinct categories are expected to cover certain experiences relevant to the study, and not intended to cover population size. The sampling was applied in order to identify and select potential sources based on special characteristics of the study population.

Having recognized the need to sort the initial participants sample out, the starting point of sampling in this research was identifying those who possess the requisite knowledge and lived experience on protecting civilian's right and dignity during extreme violence. The initial purposive sampling identified a potential category of participants whom in one way or the other are concerned with the response to the humanitarian crisis posed by Boko Haram in the country. The academics are almost certainly part of most research initial purposive sampling, and so, this research started by identifying some of the academics having expert knowledge on the topic. Another potential source of data directly related to the research

includes those from the executive branch of government security institutions who are directly involved in the front line of the armed conflict in the North-Eastern part of Nigeria. Such institutions include the Army and the Police. In the subsequent chapters, I will explain the reason and purpose of choosing each of the purposive sampling categories.

3.5 Purposive Sampling Characteristics

As mentioned above, the importance of initial purposive sampling in this research was to identify potential information source that could be used in forming the necessary foundation from which the theoretical sampling will emanate and evolve throughout the rest of the data collection process. The research identified academics that are well experienced and well-informed on rules of armed conflicts and how the law was applied in previous cases. As an interdisciplinary research which covered issues of law, politics, and history, the research started by interviewing renowned university scholars of law in international law. This initial sampling helped the research in building what was basically crucial to the empirical data collection process. What was particularly interesting about the interviews held with the selected academics was the fact that, aside from the highly productive sessions we had, they all were keen to help and connect me with other important targets and to offer me valuable materials. By this means, concepts and themes started to evolve and connect to other core issues related to the phenomenon under study.

Following the initial interviews with academics from different field of study, the participants sampling took another dimension, this time around purposefully focussed on exploring those concerned with responses to the humanitarian crisis posed by Boko Haram by upholding human rights and dignity. Such targets include the National Human Rights Commission, the National Emergency Management Agency, and Office of the Attorney General of the Federation, the Nigeria Security forces. This special category of participants were purposely selected based on the preconception of their capacity as government officials

whom are constitutionally responsible for responding to, and managing civilian's right and dignity, especially those displaced by the war in the north-eastern part of Nigeria. The rationale behind selecting these participants for interview is to obtain first-hand information on the challenges, if any, in managing the plight of the victims and overall safety of the citizens in the tragic situation they found themselves. The interview sought to find out each of their respective roles, efforts, and safety measures put in place to protect or alternatively reduce the effects of the war in the North-Eastern part of the country.

In addition to exploring the stakeholders in government agencies, the research identified the security agencies that are under the constitution bestowed with the power of protecting the territory of Nigeria against any form of threat. These bodies are vested with the responsibility of responding to the Boko Haram inhumane activities and the danger they pose to the security consequence on Nigeria and the global community. It seeks to evaluate the methodology adopted by the Nigerian forces; together with the challenges they face if any, in observing the rules of engagement in the front line. Such rules include those that are targeted at protecting the civilian population and civilian objects as well as persons who no longer take part in active hostilities. They also restrict the means and methods of warfare. The overall purpose of engaging with these stakeholders is to understand the emerging challenges in the implementation of IHL in Nigeria, including such issues as the increasing participation and targeting of civilians, the evolving use of high-tech warfare in asymmetrical conflicts and the spread of suicide attacks.

3.6 Initial Interviews: Observational and Data Analysis

After the initial identification and selection of the above participants, the research proceeded with oral interviews and analysis concurrently, while keeping record of some vital observational data. The initial interviews focused on exploring the challenges that for whatever reason(s), continue to inhibit the effective implementation of international

humanitarian law in the Boko Haram armed conflict; to comprehensively understand the experiences of the victims and what they expect from those who are required by law to protect them in the face of danger. Both semi-structured and unstructured interviews were conducted for maximum exploration of the participant's general knowledge and deep insight into the subject matter. The initial interview questions were based on the distinctive character and experience of the participants, which overall, provided rich and diverse data - touching on range of issues relevant to the research enquiry. As the interviews progressed, a concurrent analysis of the data was applied, producing concepts and themes that set the tone and direction to the research.

Each of the initial interviews generated key issues seeking further exploration, for example the Human Rights Commission's claim of taking actions against all the allegations of sexual violence, especially in the internally displaced camps, particularly in Maiduguri, Yobe and Adamawa states respectively. This redirected the research to some non-governmental organizations, and human rights activist group for interview and substantiation of those claims. Again, the initial purposive sample interviews with the country's governmental agencies raised a different question which needs further verification and analysis. In addition to the initial interviews, observational data also formed an integral part of the data collection method. The observational data proved useful in overcoming discrepancies between different claims from the initial interviews; such as, for instance, the disaster and emergency management claim of responding to the humanitarian needs of the internally displaced persons or the human rights commission's claim of taking actions against the abuse of women and young children in the conflict zones. Some of the vital observational data collected in the early stage of the initial sampling include visiting some IDP camps in the federal capital territory, and some camps in Maiduguri. This data was very important as it

helped examine and establish the reality of the civilian's experiences and the government's primary duty of protecting its citizen's life and dignity in the face of threat.

3.7 Evolving Concept and Categories from Initial Data Analysis

Once the first sets of interviews had been conducted, I then applied a *key point coding system* to analyse the data I collected. This coding system involves three level of coding, starting with an *open coding* where the data was divided into similar concepts and categories of information. This was followed by *axial coding* which involved the process of relating the categories and concepts to each other with the purpose of understanding the generic relationships of persons (including the victims) involved in the conflict and the phenomenon under study. While the *selective coding* that wasapplied to integrate the concepts and categories to produce a coherent research project. Some of the categories generated from the initial coding analysis, particularly from the interviews with the government officials here include the understanding thatNigeria is a state party to the four Geneva Conventions of 1949 and their two Additional Protocols of 1977, the principal IHL instruments, the International Criminal Court and in many cases, no genuine criminal investigation is initiated against alleged perpetrators of war crimes and crimes against humanity.

Victims of violence have not received redress or reparation, including compensation, leaving people on the breadline withstoking feelings of bitterness and desperation. From this emerging concept, the government's obligation to take stepsto ensure that its security forces and members of the "civilian JTF" adhere strictly to their obligations under international human rights law, and international humanitarian law in particular, ensures that detainees are protected from extrajudicial executions, torture and other ill-treatment, but are to be treated humanely at all times.

Another example of concepts and categories emerging through the comparative analysis of the initial information was the recurring theme of how the Nigerian

governmentconsistently negated the obligation imposed by international law to investigate and prosecute egregious violations of IHL by its military and other security agencies. This include investigating whether or not Nigeria is struggling to provide basic security to its citizens, while exploring the challenges that continue to create the windows for the alleged human rights abuses, poor security atmosphere, weak state syndrome, untrained security personnel, lack of independent courts; and cover ups for violations of IHL etc.

3.8 Interview Guide

Interviews are one of the essential research techniques and particularly useful for understanding the real world and getting to understand the story behind research participant's experiences.[679] One of the defining features of the constructivist grounded theory approach used in this research is the attention it pays to construction of meanings and understandings from the interactions with the real world and research participants. For that reason, I carried out a face to face semi-structured and unstructured interview covering a wide range of issues relating to the topic of the research. I was in the field for roughly about five months where I personally interviewed 58 participants face to face, while also interviewing 3 others via mobile phone. The interviews were particularly useful for exploring participant's experiences, while also looking to construct meanings and understanding from the interaction.

The interviews usually lasted from 30 minutes to an hour, and contained a list of standardized and open-ended questions that offered the necessary freedom and flexibility to pull as much detailed information as possible. The interview questions are designed based on Michael Patton's six types of interview questions that include the experiential and behavioural questions, which examine what a person does or has done. The opinion and value questions are designed to understand what people think about some issue or experience. Then

[679]DiCicco-Bloom B, and Benjamin Crabtree "The Qualitative Research Interview" (2006) 40(4) *Medical Education,* 314

feelings questions, which elicit the emotional responses of peoples' experiences and thoughts.[680] A number of general questions were asked to allow participants take control of what and how much information they want to share and how long they wish the interview to continue. Those general questions were followed by probing questions to keep the focus on the main part of the interview or interaction. The interviews were conducted in three languages English, Kanuri and Hausa respectively, out of which eight was in Kanuri, six in Hausa. Fifty eight of the interviews were recorded using electronic recording device with the participant's informed consent. Those recorded interviews were transcribed manually and three other oral interviews conducted via phone were saved, transcribed and stored in an encrypted media storage device. Participant's consent was sought and granted prior to the interview. This was confirmed through request letters sent to each of the participants with consent forms attached. The participants were contacted via phone or emails some days before the arranged date for the interview to confirm the appointment and to make them acquainted with the purpose of the research.

3.9 Ethical Issues

The data collection process was embarked upon after receiving clearance and approval from the Coventry University Research Ethics Committee. In line with the ethical regulations, the research proceeded with the set out ethical standards throughout the data collection process to the final conclusion of the thesis. Initial informed consent of the research participants was sought prior to interviews, where a brief summary of the research background and objectives was communicated to let the participants know what the research is all about and will only be treated as an academic document. This was carried out via letters sent by email, post or direct communication. This is to ensure there was voluntary consent as part of the research's ethical standards. The research also ensured participants' confidentiality and anonymity. Therefore,

[680] Patton M. Quinn *Qualitative Research and Evaluation Methods* 3rd (Sage Publications, 2002) 3

the stakeholders and institutions involved in this research will remain anonymous and will respectively be referred with special code(s) in the subsequent chapters 4, 5 and 6 that represent the analysis of the data collected.

The identity of the research participants were kept anonymous and all other personal details including contact address were kept separate from computerised data. Being a medium risk research study, extra caution and ethical consideration was given paramount importance by the research to minimize the risk of harm and injury. In doing so, Coventry University, through the Deputy Vice-Chancellor, provided me with a link and password to access red24; a security service provider that provides access to an up to the minute information on global security and condition of situations. To obviate the danger of terrorists' attacks or any form of political crisis in the field settings, the research avoided all crowd gatherings, including political and religious gatherings.As a Nigerian, I was aware of the social and political tension in the research setting and to avoid, and minimize this risk, the research omitted and does not include communities and places prone to the attacks, as advised by the ethics committee.

The idea of concealing the identities of participants has attracted debate from many researchers. Tilley and Woodthorpe claimed that most institutions authorize masking the identities of research participants as a default point.[681]The ethics of anonymity is opposed by opponents who argue against the overprotectiveness and an exaggeration of the anticipated damage as a consequence of lack of anonymity.[682] Others point out the adverse effect default anonymization can have on research results, arguing that on issues such as places and settings

[681] Tilley Liz and Woodthorpe Kate "Is it the end for Anonymity as we Know it? A Critical Examination of the Ethical Principle of Anonymity in the Context of 21st Century Demands on Qualitative Researcher" (2011) 11(2) *Qualitative Research*, 197

[682] Niamh Moore "The Politics and Ethics of Naming: Questioning Anonymization in (archival) Research" (2012) 15(4) *International Journal of Social Research Methodology*, 331

can leave authorities unchallenged,[683] thereby, impeding the search of transformative research aims.[684] However, Kelly noted that most participants still want their identities masked.[685]Accordingly, Cordon and Sainsbury argued that most times, research participants don't have a clear knowledge of how the information they have given will be treated,[686] such that the Wiles claimed that impending injury from identifying participants will be difficult to avoid.[687] However, in recent years, the question of concealing the identity of research participants is addressed with the use of consent forms to avoid issues that may be injurious to the participants in the future.[688]

3.9.1 Data Management

Research data management is an essential part of this study which is concerned with the creation, organisation and storage of data throughout the study period. The research was committed to the University policy of data preservation and protection in accordance to the General Data Protection Regulation 2016 (GDPR). Information collected including oral and documentary data were properly managed and stored. Oral interviews were recorded using an electronic recording devise, transcribed, and properly stored on a secured password-protected computer and encrypted storage device with access restricted to the researcher. Also, the observational data including field notes and memoirs were organised and reduced into a single word document and stored in a safe and encrypted storage device. All data collected was used strictly for the declared purpose of the study and retained in line with the Coventry

[683]Walford Geoffrey "Research Ethical Guidance and Anonymity" (2005) 28(1) *International Journal of Research and Method Education*, 83
[684] Benjamin Baez "Confidentiality in Qualitative Research: Reflections on Secrets, power and Agency" (2002) 2(1) Qualitative Research, 35
[685] Anthony Kelly "In Defence of Anonymity: Re-joining the Criticism" (2009) 19 (11) *British Educational Research Journal,* 431
[686] Anne Cordon and Roy Sainsbury R "Exploring quality: Research Participants Perspective on Verbatim Quotations" (2006) 9 (2) *International Journal of Social Research Methodology*, 97
[687] Rose Wiles "Anonymization and Visual Images: Issues of Respect, Voice and Protection" (2012) 15(1) *International Journal of Social Research Methodology*, 41
[688] Benjamin Saunders, Jenny Kitzinger, and Celia Kitzinger "Participant Anonymity in the Internet Age: From Theory to Practice" (2015) 12(2) *Qualitative Research in Psychology*, 125

University data storage policy; all personal details of participants were destroyed after completion of relevant findings and analysis.

3.9.2 Doctrinal Component of the Research

In addition to the empirical inquiry, this research also consists of a doctrinal component which is concerned with a detailed and systematic analysis of the rules governing the research's legal issues, the relationship between rules, areas of difficulty and, perhaps, future developments.[689] Research into legal rules largely relates to their relevancein a givensituationbecause they are not just convenient norms, but are intended to be rules consistently applied and which evolve gradually.[690] It follows that doctrinal research is a study into the law and legal concepts.[691]

Like any other legal rules, the aspect of international humanitarian law that only applies in times of armed conflict, is a black letter law subject that is based on the interpretation of statutes, cases and international customary practices.[692] The legal rules, statutes, cases and customary practice cannot in themselves provide a comprehensive clarification of the law in all situations. It is therefore important to analyse and apply the relevant legal rules to the particular facts of the study phenomena.[693] The primary aim, therefore, of the study is to present critically analyzed challenges that continued to affecteffectiveenforcement of international humanitarian law in Nigeria, in its fight against Boko Haram.Therefore, an examination of the various international law instruments adopted and ratified by different member states, such as the UN Charter and Geneva Conventions and the two Additional Protocols, will essentially lead the research to look beyond the black letter law.

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[689] Consultative Group on Research and Education in Law, Law and Learning: Report to the Social Sciences and the Humanities Research Council of Canada (Information Division of the Social Sciences and Humanities Research Council of Canada, 1983)
[690] Hutchinson Terry and Duncan Nigel "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17 (1) *Deakin Law Review,* p.85
[691] *Ibid*
[692] Andrew Knight *Advanced Research Methods in the Built Environment* (Blackwell Publishing, 2008) p. 14
[693] *Ibid*

The doctrinal component of the research involves a process of identifying the sources of the legal rules and then interpreting the lawwithin a specific context. Once the general legal principles underlying the rules and limits in armed conflicts or war are identified, it could then be applied within the context of the study phenomena. The primary legal sources of data in this study, as has been cited earlier in the work, include international law legal instruments, such as, the UN Charter, the Geneva conventions and the Additional Protocols, as well as court cases and decisions. Debates and the legislative history of these international legal instruments, the court decisions and the general states practice on enforcement or violations of international humanitarian law rules in times of hostilities are all examined to address the research question.

Like any other legal research, the doctrinal component of this research requires review of existing secondary data related to the research topic.The rationale behind examining the existing literature on the legal aspect of the research is to identify key areas of convergence together with divergence that may exist in the domestic law on acts of terrorism and enforcement of IHL and related legal opinions of other legal scholars. It also helped offer a wider understanding of the relevant issues. The existing secondary data sources include key legal textbooks, journal articles, law periodicals, legislative debates and other publications. Another valuable source of existing data that was particularly useful in this research has been the International Criminal Court, and some of the Ad hoc International Tribunals, which have substantially addressed controversial legal issues on violations of IHL rules over the years.

3.9.3 Normative Character of the Legal Research

Legal research is often torn between achieving as much as possible by expanding the practical aspect of the law and its context, and reducing this complex whole to a manageable proportion.[694] The internal analysis of the legal rules involves a number of approaches, such

[694] *Supra*, note 502

as argumentative, exploratory or normative. Each of these legal doctrine approaches involves its own methods, and each research question will imply the use of the appropriate method(s).[695] This research adopted the normative legal doctrine approach to build a system of generally valid ideas that presuppose the normative contents of international humanitarian law. A legal doctrinal research is referred to as normative for taking a normative position among values and interests.[696] The obvious advantage of the normative approach is that it essentially explains what is desirable in problem-solving legal research seeking a new understanding and legal solutions to a particular complex area of the law.[697] This approach is particularly useful for this research as it essentially aims to identify a potential legal solution regarding the conflict between the contemporary challenges in the effective enforcement of international humanitarian law in the fight against Boko Haram armed group. Although normative positions cannot be true or false, they must however, be justified. The justifications for the research positions, (as will be seen throughout the research), will include valid analogical reasoning and inductive reasoning. The role and rationale behind the use of normative reasoning in this research is explained below.

3.9.4 Role of Normative Reasoning

The analytical positivist approach to legal theory advocated by H.L.A Hart has challenged its inability to give a satisfactory account of legal reasoning, especially reasoning-in-adjudication.[698]The normative approach in this research involves the use of inductive reasoning that entails reasoning from specific cases to a general rule. This is particularly useful owing to the fact that international law did not fill the lacuna of effective enforcement vis-à-vis the protection of human life when it is threatened. Therefore, this makes it key to filling the gap in the law. The legal reasoning involves the recognition of a new general rule

[695] *Ibid*
[696] JaanHage "The Method of a Truly Normative Legal Science" (2010) *Metro Institute*
[697] *Ibid*
[698] Atria Fernando "Legal Reasoning and Legal Theory Revisited" (1999) 18(5) *Law and Philosophy*, 537

which emerges from a number of earlier authorities which are then regarded simply as particular instances of the new rule. The normative approach also includes deductive reasoning to examine similar cases that have previously come before the courts or other dispute resolution mechanism. If upon examination the facts of these cases are found to be sufficiently similar to the facts of the subject matter, then it can be concluded that the subject matter should be treated in the same way.

3.10 Sources of Research Secondary Data

In a way, the study of the challenges of the enforcement of International Humanitarian Law (IHL) in Nigeria add to the general understanding of armed conflicts and their effects on the safety and dignity of human kind, domestic and international alike.[699] The secondary source utilizes the archive collection of International Criminal Court. The library contains a wide collection of sources of IHL particularly the several Commission of Inquiry Reports on conflicts that have endangered mankind, especially conflicts that the international system ought to have taken responsible measures, but could not because of the envisaged challenges that have inhibited. Through the websites of the UN, I retrieved relevant statutes guiding the conduct of warfare, since the very centre of my research is on rules of warfare. The various laws governing warfare and recent developments such as the additional protocols to the Geneva Convention will all be critically analysed to help in the understanding of the challenge of international law as a factor to the effective enforcement of IHL in general.Google Scholar also serves as a useful source where many documents relevant to the topic under study have been well documented. Books, chapters in books plus peer reviewed journal articles can easily be sourced from the Lancaster library, Coventry University that is reputable for housing some of the biggest minds in the area of conflict research.

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[699] Hamid Abdul Ghafur and KhinMaung Sein *Public international law: a practical approach*. (Sweet & Maxwell Asia, 2011)

The study also includes an analytical legal research approach, which entails a research into legal rules, principles, concepts and doctrines. It includes the constitution of Nigeria, the national gazette, statutory laws and laws of administrative agencies. It also includes judicial pronouncements of higher courts, international treatises, *opinio juris*, and encyclopaedias. In the final stage of the methodology, after exploring the various literatures as evidence to back up the suggested sub-topics, I will then draw the conclusion that will capture whether there is a likelihood of Nigeria overcoming those challenges in the near future.

Chapter Four

Sexual Violence and the Conflict in Northeast Nigeria: The Challenges of Weak Institutions and Disciplined Security Forces

4.0 Introduction

The situation in North-East Nigeria constitutes a non-international armed conflict, and thus, IHL rules that regulate non-international armed conflict apply. This includes Additional Protocol II of the Geneva Conventions, which Nigeria has ratified.[700]There is an increasing awareness on the effect of war on human dignity around the world.[701] Nothing suffers more than human lives during armed conflict.[702] The situation appears to be exacerbated when the conflict involves irregular forces such as armed groups or insurgents, or even terrorists, because they have no knowledge or respect for the established laws of war.[703] Most research have concluded that State forces have a grasp of the rules of engagement requiring the protection of the vulnerable population during armed conflict including women, children, the aged and civilians not participating in the armed conflict. It is this understanding that has guided much research in both fields of international humanitarian law and international criminal law. However, this research argues against the conclusion that conventional armed forces are as a general rule - trained and disciplined and thus have a tendency to respect the established laws of armed conflict. However, this study has demonstrated that the security forces in Nigeria were not well disciplined to respect those established laws in the Boko Haram armed conflict, and therefore, the Nigerian government must ensure accountability for the violations of IHL committed by soldiers and Civilian JTF in the conflict.

[700]Ratified by Nigeria in 1988; it likewise include customary international humanitarian law which Nigeria is bound by

[701]Sadaf Shazia "Human Dignity, the 'War on Terror' and post-9/11 Pakistani Fiction" (2018) 22(2) *European Journal of English Studies,*115 at 115

[702]Victor W Sidel and Barry S Levy "The Health Impact of War" (2008) 15(4) *International Journal of Injury Control and Safety Promotion,* 189 at

[703]Hufnagel M Saskia "German Perspectives on the Right to Life and Human Dignity in the 'War on Terror'" (2008) 32(100) *Criminal Law Journal,* 100 at 102

The research query of this study thus becomes this: Is it possible to develop, through the courtrooms of international law, enhanced rules of international humanitarian law as may assist in combating impunity for those who perpetrate sexual violence against women and girls in the Boko Haram armed conflict, thereby contributing to deterrence against such violations in future and, thus, better protection to women and girls? The chapter focuses on the critical assessment of the challenges of undisciplined security forces and weak judicial system in the effective enforcement of IHL in the Boko Haram conflict, particularly in relation to the violations committed against women and girls in the internally displaced camps and military detention centres in northeast Nigeria.

While it is expected that conventional armed forces should be seen to lead in the quest to respect the rules of war, the case of the Nigerian armed forces has been at best, disappointing and a departure from that assumption. Since the transformation of Boko Haram from a group of radical believers to an extremely violent insurgent group, sexual violence has featured prominently in the conflict that is characterized as non-international armed conflict.[704] Indeed, "women's lives and their bodies have been the unacknowledged casualties of war for far too long."[705] Rape and other forms of sexual violence such as sexual slavery have been reported in many instances in the North-Eastern region with little or no response from the Nigerian state.

By way of methodology, this study interviewed victims, government agencies, and civil societies. Further, key debates in the jurisprudence of international criminal tribunals that relate to sexual crimes in armed conflicts, with a view to distilling from them practical solutions that are aimed at addressing the problem of sexual violence against women and girls in relevant aspects. Such discussions in this study will focus on the following issues: definition and adjudication of rape in international law; sex crimes and genocide; the issue of

[704]Sassòli, Marco "Transnational Armed Groups and International Humanitarian Law" Program on Humanitarian Policy and Conflict Research, Harvard, Occasional Paper Series 6 (2006): 1 at 1
[705] Wars Overlooked Victims, the economist, Jan 15, 2011, at 54

forced marriage as a crime against humanity and superior responsibility etc. The chapter argues that indiscipline and poor judicial infrastructure are among the most visible challenges confronting the enforcement of international humanitarian law in the North-Eastern region of Nigeria.

To analyse the resources gathered in the field, the chapter is further divided into four sub-sections. The first part discusses the summary findings of the field data. The second sub-section deals with the definition of the various perspectives on elements of sexual violence including rape and reparation for the victims of sexual violence in northeast Nigeria. Reparation is focused on restoring the wellbeing of survivors of sexual violence and ensuring them a place of dignity in society through tangible forms of assistance as well as symbolic measures. Third, to draw practical measures of prosecution on these grounds, these definitions were derived from judicial rulings by competent judges and tribunals. The essence of the definitions is to enable the reader to appreciate the available avenues to undertake the prosecution of related cases of sexual violence in Nigeria's war against Boko Haram. In particular, it covers opportunities for prosecution of alleged perpetrators of international crimes of the Rome Statute before the International Criminal Court. This sub-section is important considering the lack of a strong and independent judicial system that is required for the effective prosecution of sexual violence in the context of the Boko Haram armed conflict in Nigeria. The chapter has demonstrated the available avenue(s) to prosecute perpetrators and their accomplice for committing heinous crimes of sexual violence in the war against Boko Haram in Nigeria.

The fourth section focuses on the challenges militating against effective enforcement of international humanitarian law in the quest to fight Boko Haram, and in particular deal with cases of sexual violence in the conflict. This sub-section deals with challenges of indiscipline of the security forces and members of the Civilian Joint Task Force on how their

actions has led to serious violations of international humanitarian law. In addition, it analyses the inherent challenges within the Nigerian judicial system including inadequacy of legislation on sexual violence and lack of access to judicial infrastructure in the North-Eastern region and Nigeria in general. The following section sets out to shed light on the various international human and humanitarian laws that were considered to have been violated in the conflict.

Against this realistic background, the humble aims of this chapter rest mainly in (a) helping to maintain visibility on a major challenge, and (b) making recommendations that may help in providing the motivation required to achieve later the instrumental objective of using IHL to protect women and girls more fully. The ultimate attainment of these humble aims would to this researcher be immensely fulfilling indeed.

4.1 Violations of International Law in the Conflict

As explained in this chapter, members of the Civilian Joint Task Force were acting under the instructions of the Nigerian Army, and/or were executing government's tasks because they have committed crimes established in this study. They have also violated international human rights and humanitarian law, and the Nigerian government bears the international responsibility for any violations in this context.[706]

Acts that constitute war crimes or crimes against humanity attract individual criminal responsibility. Grave violations of international humanitarian law constitute war crimes.[707] Crimes against humanity are prohibited acts perpetrated as part of a widespread or systematic attack targeted at a civilian population as part of a government or organizational policy.[708] The contextual factors of crimes against humanity require that each individual act be

[706] International Law Commission, Responsibility of States for internationally wrongful acts, Draft Articles of 2001, Articles 8 and 9 – the CJTF were supporting the Nigerian soldiers manage the IDP camps when they perpetrated the acts indicated in this chapter

[707] See Article 8 (2) (c) of the Rome Statute; See also Rule 156 of the ICRC's Customary International Humanitarian Law

[708] See Article 7 of the Rome Statute to which Nigeria is a party

committed in the context of a widespread or systematic attack directed against a civilian population and with knowledge of the attack. Each element of these requirements must be proved before any accused person can be convicted of crimes against humanity. The human rights violations explained in this chapter indicate the context and nature of the attacks perpetrated against women and girls in north-east Nigeria, may each constitute crime against humanity, and stressed the obligation of Nigeria to investigate these violations as possible crimes against humanity.

Consequently, in the following section, we begin by outlining the research findings from the data obtained, focusing on the Nigerian security treatment of women and girls in IDP camps and detention centres, as well as on women's experiences in areas once controlled by Boko Haram group.

4.1.2 Summary of Research Findings: The Plight of Women and Girls in the Conflict

Based on the empirical evidence obtained, scores of women in the Boko Haram armed conflict described how the military forces alongside members of the Civilian Joint Task Force (CJTF) used force and threats to rape women and girls, and seized the opportunity of the situation to coerce women and girls into becoming their 'girlfriends,' which presupposed being available for sex at regular intervals. Seven women reported cases of rape to the researcher. This included three women who disclosed that they had been sexually abused and raped by the Nigerian military or Civilian JTF members while they had been starving or near starving in Dalori IDP camp in late 2016 or early 2017. Four additional women disclosed that they had been forced to become the 'girlfriends' to the military forces and the CJTF in Dalori IDP camp. They explained that they were pushed to be their girlfriends simply for them to get access to basic necessities for survival, and because no one dares to say 'no' to the demands of the security forces. The coercive environment that was created and exploited by the military and the CJTF members implies that consent to sex was practically impossible.

Women and girls interviewed expressed how the military and CJTF established an organized pattern to inflict sexual violence in Dalori IDP camp. The CJTF members select women in the camp(s) and take them to the military officers for sex. Two young girls between the ages of 14-19 stated that the structure of the Dalori camp was designed to make the sexual exploitation most convenient, by splitting young women and girls from their families - such as family in-laws and other people in the camp. They reported that if anyone amongst them dares to complain, they risk being tagged as 'Boko Haram wife' and face reprisals.

The military and Civilian JTF members used force, or created or seized the opportunity of a coercive condition or circumstances; to have sex with women and girls in the IDP camp(s) may have committed the crime of rape. Because of the circumstances in which these crimes were perpetrated, those culpable may have committed war crime and crime against humanity of rape. If the members of the CJTF aided through selecting and taking these women and girls to the military for sex, such as being paid or rewarded in other forms by the military personnel involved, they may equally have committed the crime against humanity of enforced prostitution.

4.2 Defining Sexual Violence in Armed Conflicts

In the task of legal restraint of the crime of sexual violence in armed conflicts, one area in need of critical attention is that of definition of rape. It is an area loaded not only with substantive issues of the elements of the crime to be proved in specific trial, but also issues of the procedural sequencing of acts in the play of proceedings, with incidental consequences relating to questions of fairness of the treatment of the victims in the trial process. Providing adequate legal response is important because the victims of such crime may if motivated by reasonable apprehension of unfair treatment, decline to report or participate in the trial process. The consequence is that perpetrators may continue to enjoy impunity.

4.2.1 Sexual Violence

In order to understand the full meaning of sexual violence, researchers must avoid the impulse to approach the subject matter from specific acts targeted at specific victims. This implies that the subject matter requires a holistic approach that would see the menace of sexual violence from a comprehensive or universal approach aimed at the psychological root of the subject. This holistic approach further suggests that it should not be treated as a mere act of crime committed against a single victim but to be seen as "collective affront against the people whom the victim represents, such as family or community."[709] First, Giddens argues that sexual violence should not be treated merely as a physical attack but should be considered as "an assault upon an individual's integrity and dignity."[710] Following from this perspective, which sees sexual violence as an act committed to an individual, Omonubi-McDonnel noted that sexual violence "degrade, control and humiliate the victim."[711] This provision clearly explains the experiences of thousands of women and girls that were exposed to physical and psychological torture; forced labour, forced marriage to their abductors and sexual abuse, including rape by the security forces.[712]

A more legal way of examining scholarly views on sexual violence is to revisit the provisions of the Geneva Conventions in which Pictet wrote a robust commentary published in 1952.[713] However, one does not need a serious perusal to know that since Pictet's publication, many events have occurred with dramatic consequences on public international law. For instance, the Geneva Conventions have enjoyed universal acceptability and "their application interpreted in hundreds of cases."[714] Similarly, since the publication of

[709]AkachiOdoemene "The Nigerian Armed Forces and Sexual Violence in Ogoniland of the Niger Delta Nigeria, 1990–1999" (2012) 38(2) *Armed Forces and Society*, 225 at 225
[710] Anthony Giddens *Sociology* 5th Ed (Cambridge: Polity, 2008)
[711]MorolakeOmonubi-McDonnel *Gender Inequality in Nigeria* (Ibadan: Spectrum Books, 2003)
[712] Anonymous Interview, Dalori Camp Maiduguri, January2018
[713]*Supra*, note 515
[714] Indira Rosenthal *Sexual and Gender-Based Violence under the Geneva Conventions: A New Commentary* (ICRC Publishers, 2016)

Pictet'swork explaining the details of the Geneva Conventions, International Human Rights Law (IHRL) has undergone serious development, merging with International Humanitarian Law, especially in conflict situations.[715] Recent efforts to develop treaties on human rights with focus on sexual violence, such as the - Istanbul Convention on violence against women; Convention on the Rights of Persons with Disabilities 2006, - have witnessed the increasing intersection of IHRL and IHL in situations of conflict.[716]As the ICTY explained; the recourse to human rights law is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law.[717]The intersection and growth of public international law can also be seen in the area of International Criminal Law. Thus, Rosenthal noted that: "International criminal law has become something of a growth industry since the 1990's when the tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the International Criminal Court (ICC) were established with jurisdiction over IHL violations."[718]Although the Geneva Conventions did not denote much time to the issue of sexual violence, the subject of humane treatment appeared firmly in Article 27 of the Fourth Geneva Conventions and an attempt to expressly denounce sexual violence appeared clearly.[719]

Unfortunately, none of the terms that appeared in the second paragraph including 'rape, enforced prostitution or any form of indecent' assault has been defined in the conventions. It is, therefore, important to examine these terms from different sources,

[715]Droege, Cordula "The Interplay between International Humanitarian Law and International Human Rights Law in situations of Armed Conflict" (2007) 40(2) *Israel Law Reviews*, 310
[716]McQuigg, Ronagh*The Istanbul Convention, Domestic Violence and Human Rights* 1st Ed (Routledge, 2019)
[717]*Kunarc*, IT-96-23-T, Judgment, 22 February 2001, para 467
[718]*Supra*, note
[719] Article 27 of the Fourth Geneva Conventions, paragraph 2"Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.
Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault

including rulings in international jurisprudence, the Rome Statute and some aspects of the Elements of Crimes of the ICC[720] and opinions of legal scholars.

4.2.2 Rape

In most part of human history, rape has been perceived as a "violation of the honour, dignity and reputation of a woman (or even of that of her husband) and not as a crime in and of itself."[721] Even when there was an appreciable awareness on an international level, conflicts still had substantial cases of rape as "military tribunals rarely charged or sanctioned it."[722] For example, many of the foot soldiers in both sides of the First and Second World Wars committed rape in various degrees but nothing was done to redress it.[723] Another major instance of neglect of rape in the war period was the lack of prosecution of Nazis who created brothels with Jewish women to satisfy their sexual urge. In fact, such instances were not mentioned at the International Military Tribunal at Nuremberg.[724]

Perhaps of more concern is the fact that after the Geneva Conventions and Additional Protocols came into being, there was hardly any difference by that enactment to the attitude toward rape during periods of war.[725] History has also shown how political expediency stood in the way of prosecution of rape cases after approximately 200,000 women from Bengali were raped. This has appeared more straightforwardly in the work by Kelly:

> "In the 1970s, an estimated 200,000 Bengali women were raped during the war of independence from Pakistan, yet ultimately, amnesty was quietly traded for independence."[726]

[720]Elements of Crime of the International Criminal Court, (2010)
[721] De Brouwer A.M., *Commentary on Gacumbitsi v. Prosecutor, Judgement', The International Criminal Tribunal for Rwanda 2005-2006: Annotated Leading Cases of International Criminal Tribunals* Vol. 24 (Intersentia, 2009) 583 at 584
[722] Rhonda Copelon "Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law" (1994) 5(2) *Hastings Women's Law Journal*, 243 at 243
[723] Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon and Schuster, 1975) 33 at 34
[724]Rückerl, Adalbert, *The Investigation of Nazi Crimes 1945–1978: A Documentation* (Muller Publisher, 1979)
[725]*Supra*, note 17 at 583
[726]Askin, Kelly D "Prosecuting Wartime Rape and other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles" (2003) 21 *Berkeley Journal of International Law*, 288 at 288

However, due to the increase of reports on the gravity of rape, especially in war times, the responses of the international community began to change in the 1990s. Beginning with the weighty reports of the Rwandan and former Yugoslavian conflicts, more productive reactions began to emerge and legal actors could no longer hold back.[727] In this vein, de Brouwer noted that:

> "In reporting both conflicts, the media highlighted the policy makers use of rape as a "weapon of war" to ethnically cleanse a population. For the first time, rape was transformed from a private, off-duty, inevitable and collateral crime to something that was public, political and worthy of criminalisation and prosecution."[728]

Following from the above, attempts have been made in international jurisprudence to define rape. For instance, the International Criminal Tribunal (former Yugoslavia), in its ruling in the popular *Furundžija* case noted that before rape is said to have occurred, "coercion or force or threat of force against the victim or a third person"[729] must have taken place. Four years later in 2001, the Tribunal in the *Kunarac* case deemed it fit to include additionalconditions "which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim."[730] It is important to note that the *Kunarac* case argued that the reconsidered position is the most accurate definition of rape in public international law.[731] Again, the *Akayesu* case which was decided by the International Criminal Tribunal for Rwanda, rape was qualified as "a form of aggression" in which its fundamental elements cannot be taken in instinctive portrayal of objects and body parts. In precise terms, rape was regarded as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[732]

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[727] Weiner, Phillip "The Evolving Jurisprudence of the Crime of Rape in International Criminal Law" (2013) 54(3) *Boston College Law Review*, 1207 at 1208
[728] *Supra,* note 45 at 584
[729] *Prosecutor v. Furundzija* Case No IT-95-17/1-T (ICTY Judgment) para 185
[730] *Prosecutor v. Dragoljub Kunarac, RadomirKovac and Zoran Vukovic* CaseNo,IT-96-23-T &TI-96-23/1-A (Appeal Judgment) para 124
[731] *Prosecutor v. Dragoljub Kunarac, RadomirKovac and Zoran Vukovic* CaseNo,IT-96-23-T & TI-96-23/1-T (Trial Judgment) para 438
[732] *Prosecutor v. Jean-Paul Akayesu* Case No, ICTR-96-4-T Judgment 2 September 1998, para 597

Rape and sexual violence can also constitute elements of other forms of crimes in international law. The *Delalic* case (the decision of the International Criminal Tribunal for the former Yugoslavia) asserts that the occurrence of rape can also be used as the basis to establish torture "when the specific conditions of torture were fulfilled."[733]Similarly, the International Criminal Tribunal for Rwanda in *Akayesu* case maintained that "rape and sexual violence could constitute genocide when the specific conditions of genocide were fulfilled."[734] The Penal Code[735] that is applicable in Northern part of Nigeria also proscribes and punishes rape. Even though the scope of the definition does not reach international standards of context of where and how the crime is perpetrated, it includes circumstances where consent has been obtained by placing the victim in fear of death or injury.[736] Data obtained has demonstrated how in several occasions, the Nigerian military and members of the Civilian JTF reportedly, sexually penetrated women in circumstances that is coercive, especially in the internally displaced camps and Giwa barracks and no consent obtained in free will.[737]

It should be noted that there is no room for discrimination in the prohibition of rape or sexual violence. This means that all people, regardless of gender, age or race, are protected by the same prohibition on rape and sexual violence. This has been put more explicitly by Rosenthal: "Except for forced pregnancy, the crimes of sexual violence in the Statute of the International Criminal Court are prohibited when committed against "any person", not only women. In addition, in the Elements of Crimes for the International Criminal Court, the concept of "invasion" used to define rape is intended to be broad enough to be gender-neutral."[738]

[733] ICTY, *Prosecutor v. Delalić* case, IT-96-21-T Judgment 16 November 1998, para 941
[734]ICTR, *Akayesu*case, Judgment 2 September 1998, para 598
[735] The Penal Code Cap 89, Laws of Northern Nigeria (1963)
[736] Section 282(1) of the Penal Code of Northern Nigeria
[737]For detailed information, see the plight of women and girls in the Boko Haram conflict above
[738]*Supra*, note 44

In the following section, we will examine different cases that have been decided by the Ad Hoc Tribunals and see how the geography of rape and the administration of reparation have changed over time.

4.3 International Criminal Tribunal for Rwanda (ICTR) 1998 – The *Akayesu*Trial

Despite a variety of views, the most significant benefit of the International Criminal Tribunal for Rwanda (ICTR) 1998 is its pioneering role in the definition of rape.[739] However, it should be noted that rape was never part of the initial issue in the case:rape was latter added to the list of crimes committed when it became glaringly obvious that the prosecution statement before the tribunal had much evidence of such instances. In fact, it was the Court itself that informed the prosecution of the need to include rape as one of the major claims. Consequent upon this action, Rene Degni-Segui who was the UN Special Rapporteur noted that, "rape was the rule, and it absence the exception."[740]

The case of genocide in Rwanda was much publicised because of the large number of lives lost, estimated to be within the range of one million people.[741] The violations and cases of rape, mutilations and murder in Rwanda however, was gender biased as it was targeted at women, numbering about five hundred thousand in all.[742] While a significant number of political and military leaders of the Rwandan armed forces were found to be culpable, Jean-Paul Akayesu was specifically committed before the Tribunal for committing "genocide crimes against humanity and violations of the Geneva Conventions."[743]

The ICTR attempted a definition of rape in the following way:

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[739]Alexandra Adams, "The Legacy of the International Criminal Tribunal for the former Yugoslavia and Rwanda and the Contribution to their Crime of Rape" (2018) 29(3) *European Journal of International Law*, 749 at 750

[740] Special Rapporteur of the Commission on Human Rights, Report on the Situation of Human Rights in Rwanda, 16, U.N. Doc. E/CN.4/1996/68 (Jan. 29, 1996).

[741]*Ibid*

[742] Chalk Frank "*Journalism as Genocide: the Media Trial*" In Thompson Allan, *the Media and the Rwanda Genocide* (Pluto Press, 2007), 372

[743]Chenault, Suzanne "And since Akayesu-The Development of ICTR Jurisprudence on Gender Crimes: A Comparison of Akayesu and Muhimana" (2007) 14(2) *New English Journal of International and Comparative Law*, 221 at 222

> "[A] physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive."[744]

However, a certain condition was attached for rape to be established. Specifically, the court noted that "coercive circumstances need not be evidenced by a show of physical force."[745]Aside from an attempt to define rape, the*Akayesu*casealso included rape among crimes that can be qualified as "act of genocide, termed as genocidal rape."[746] Accordingly, the recognition of rape as act of genocide has now become a prominent feature of international criminal law as encoded in Article 6 of the Rome Statute.[747]

The most significant aspect of the ruling to the development of the definitional value of rape relates to the following point:

> "[R]ape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture…does not catalogue specific acts in its definition of torture, focusing rather on the conceptual frame work of state sanctioned violence. This approach is more useful in international law."[748]

The imprecision in the above definition is glaring. However, it is to the advantage of the victims of rape as it "allows room for more conduct to be captured within the definition,"[749] argues Alvarez.

4.3.1 The *Furundzija* Case

Immediately after the *Akayesu*[750] case was decided, the *Furundzija*[751] case added momentum to the evolution of the criminal definitional framework of rape. As noted above, the *Akayesu* case did not specifically address rape but it was simply added to it by the prosecution following the advice of the court. However, it was the first case that dealt with specific charges on rape. Describing the nature of the case, Marzen noted the following:

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[744]*The Prosecutor v. Jean-Paul Akayesu* ICTR-96-4-T, Judgment 2 September 1998, para 598
[745]*Ibid* at para 688
[746]*Supra*, note 41 at 372
[747] UN General Assembly, Rome Statute of the ICC, A/CONF.183/9 (last amended 2010) 17 July 1998. Available at: https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf (Accessed April, 2020)
[748]*The Prosecutor v. Jean-Paul Akayesu* ICTR-96-4-T Judgment 2 September 1998, para 597
[749]Alvarez E Jose "Lessons from the Akayesu Judgment" (1998) 5 *ILSA Journal of International and Comparative Law*, 359
[750]*The Prosecutor v. Jean-Paul Akayesu* ICTR-96-4-T, Judgment, 2 September 1998
[751]*Prosecutor v. Furundzija* Case No IT-95-17/1-T

> "Furundzija was the local commander of the "Jokers", a unit of the Croatian Defence Council, and was convicted based on the rapes that took place during the interrogation of a Muslim woman, and was convicted of torture and outrages upon personal dignity, including rape."[752]

The *Furundzija* case claimed that there is no clear internationally acceptable legal definition of rape. It also queried the inherent imprecision of the *Akayesu*attempt at defining rape. Consequently, the court relied on a nationwide survey to determine the correct language and issues to include in what is to be termed an internationally acceptable definition of rape.[753] After much deliberation, the judges devised what they felt was a more acceptable definition of the concept of rape. The judgment thus established additional requirements which must be part of what constitute rape:

"The following may be accepted as the objective elements of rape:

(i) The sexual penetration, however slight:

(a) Of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator;

Or (b) of the mouth of the victim by the penis of the perpetrator;

(ii) By coercion or force or threat of force against the victim or a third person.[754]

In contrast with the definition offered by the *Akayesu* case, the *Furundzija* case relied on specific touching of body parts to establish rape. It also discusses force which is not in line with the definition of rape in the *Akayesu* case. 'Consent' as a basic factor in establishing rape was not mentioned in the definition offered by *Furundzija*. However, the factor of 'consent' was discussed as seen below:

> "Any form of captivity vitiates consent. Under Rule 96 of the Rules, it is clear that no corroboration of the evidence… is required."[755]

Drawing from the above explanatory note, it is clear that consent (though absent in the definition) remains a fundamental factor in establishing the occurrence of rape. One fundamental aspect of the *Furundzija* definition relates with the reduction of the scope for

[752]Marzen G Chad "The Furundzija Judgment and its continued vitality in International Law" (2009) 43 *Creighton Law Review*, 505 at 506
[753]*The Prosecutor v. AntoFurundzija* IT-95-17/1-T paras 174 and 184
[754]*Ibid* para 185
[755]*Ibid* para 271

victim's privilege which was very visible in the *Akayesu* definition. This was done to enlarge the scope of the definition to provide a broader perspective to the understanding of rape.

4.3.2 The *Kunurac* Case[756]

The name *Kunarac*resonatesin international criminal law following his conviction for torture, rape and, enslavement, and crimes committed against humanity when he was the head of a reconnaissance unit of the Bosnian Serb Army.[757] There are two phases in the development of the definition of rape relating to this case; while the first one can be derived from the Trial Chambers judgment, the second is deciphered from the judgment in the Appeals Chamber.

4.3.3 The Trial Chamber Judgment

In principle, the view expressed in the definition of rape in the *Furundzija* case was upheld in this case.[758] However, the position of the Trial Chamber judgment in respect of the definition of rape differs in the manner in which the *Furundzija* definition did not place emphasis on the requirement of force in its definition, as mandated by international law.[759] Accordingly, the judgment of the Trial Chamber noted that the absence of 'force'[760] limited the scope through which victims of rape can seek for justice. It was based on this observation that the Trial Chamber defined rape in the following way:

> "The actus reus of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."[761]

Although the definition infuses certain aspects observed in the previous opinions on rape, it reintroduced the aspect of 'consent' as a central feature of the definition of rape.

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[756]*The Prosecutor v. Dragoljub Kunarac, RadomirKovac and Zoran Vukovic* IT-96-23-T & IT-96-23/1-T
[757]*Ibid*, at 281
[758]*The Prosecutor v. Dragoljub Kunarac, RadomirKovac and Zoran Vukovic* IT-96-23-T & IT-96-23/1-T at para 438
[759] *Ibid*, para 438
[760]*Ibid*, para 46
[761]*Ibid*,para 460

4.3.4 The Appeals Chamber Judgment

As is customary with appeal cases, the appellant challenged key aspects of the judgment, particularly the definition of rape by the original Trial Chamber. The Appellant argued that rape cannot be said to have taken place unless certain conditions are established. Specifically, the appellant maintained that there must be two additional elements in a definition requiring penetration: "force or threat of force and the victim's "continuous" or "genuine" resistance."[762]

In its response, the Appeals Chamber accepted the initial position of the Trial Chamber's definition of rape and made two points in light of that definition of rape. First, the requirement claimed by the appellants that 'resistance' should be made as a condition was rebuffed as illogical as having no basis in "customary international law."[763] Another aspect of the definition that was discussed was the effect of force in qualifying the crime of rape. It can be recalled that the Trial Chamber departed from the initial definition of rape, which focussed **"***the absence of consent as the conditio sine qua non of rape*."[764]The Appeals Chamber endorsed the position of the Trial Chamber, which did not place emphasisonconsent in certain situations, particularly in cases ofgenocide.The situation pictured in the definition reflected on the obvious circumstances in the *Kunarac*case as the victims (mostly women) were forcefully detained and were at the mercy of their abductors. Based on the scenario, "such detentions amount to circumstances that were so coercive as to negate any possibility of consent."[765] As noted elsewhere, force was not contended in the definition of rape in the Trial Chamber. This has error has been interpreted as "intentional in an attempt to ensure as wide a scope as

[762]*Prosecutor v. Dragoljub Kunarac, RadomirKovac and Zoran Vukovic* (Appeal Judgment), IT-96-23 & IT-96-23/1-A, para 124
[763]*Ibid*,para 128
[764]*Ibid*, para 129
[765]*Ibid*, para 132

possible for rape victims outside that of pure physical force."[766] The Appeals Chamber itself has rationalised that: "A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force."[767]

This definition perfectly fits into the situation of women and girls in the Boko Haram conflict. For instance, thousands of women and girls were be sexually exploited by the Nigerian security forces and members of the Civilian JTF in IDP camps. Women and girls were coerced to become girlfriends or wives of the Nigerian military or the CJTF which involved being accessible for sex on a regular basis in exchange for food. Women who complied with these demands to be girlfriends or wives said they agreed in order to get enough food to survive. They explained to the researcher how both the military and CJTF created and took advantage of these situations. Twenty seven year old Mara (not her real name), said that when she arrived in the camp in 2016, military forces and CJTF members took away the food meant for them, forcing women to have sex to access supplies. She said:

> Eighty five percent of the women in the camp have a boyfriend. Because all of us in the IDPs- we need assistance to get what we need to live. And the military and CJTF know this. So when they see you, if the lady is young and beautiful, they will start helping you. So when they help you, you know you have to pay for it, so you will go and sleep with them. From there the relationship starts. If you refuse, you wouldn't get anything. Any benefit available in the camp would be denied to you. They will say you are a Boko Haram woman, a Boko Haram wife. You may be in trouble. They will harass you. You may have to hide in your tent. Otherwise, they will make trouble for you.[768]

Even though the researcher was informed by some camp officials that the soldiers and CJTF were no longer allowed entering the camp at night, several women disagreed. They claimed the soldiers continue to enter the camp in the evening to have sex with them, and that girlfriends are allowed to leave the camp at night to meet the soldiers.[769]

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[766]Dripps A. Donald "Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent"(1992) 92(7) *Columbia Law Review Association*, 1780
[767]*Prosecutor v. Dragoljub Kunarac, RadomirKovac and Zoran Vukovic* (Appeal Judgment), IT-96-23 & IT-96-23/1-A, para 129
[768]Anonymous Interview Dalori Camp, December, 2017
[769]*ibid*

4.3.5 Rape under the International Criminal Court

Although rape was not specifically defined in the Rome Statute,[770] but added amongst what constitutes crime against humanity and also as a war crime.[771] However, an attempt was made to define rape as part of the Elements of Crimes of the International Criminal Court, 2010. It stated two conditions that may qualify as rape.[772]

In the following section, we would critically analyse how the ICC treated the crime of sexual violence and the condition(s) the Court sets out in order to prove the crime of rape in the context of armed conflict. This is important because it guides us to understand the controversy surrounding command responsibility and legitimacy of consent – given in a coercive environment, particularly in relation to the circumstances of women and girls in areas under Boko Haram control, IDPs camps, as well as military barracks in Maiduguri.

4.3.6 The *Bemba* Case[773]

Legal scholars have high regard for the judgment in the Bemba case for two main reasons. First, the Bembe case goes down in history as the first case decided by the ICC which led to a "conviction for rape."[774]SamiroDaoud, a senior director with Amnesty International in West Africa remarked that the judgement is "an historic moment in the battle for justice and accountability for victims of sexual violence in the Central African Republic (CAR) and around the world."[775] Furthermore, it is now known that "Bemba was the first ICC defendant

[770] UN General Assembly, Rome Statute of the ICC, A/CONF.183/9, (last amended 2010), 17 July 1998
[771] Article 7 and 8 of the Rome Statute, 1998
[772] Article 7(1) (g)-1 and Article 8(2)(b)(xxii)-1, ICC, Elements of Crimes, 2011"The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent
[773]*The Prosecutor v. Jean-Pierre Bemba Gombo*ICC-01/05-01/08
[774]D'Aoust Marie-Alice "Sexual and Gender-based Violence in International Criminal Law: A Feminist Assessment of the Bemba Case" (2017) 17(1) *International Criminal Law Review*, 208 at221
[775]Amnesty International 'ICC Conviction of Former Congolese Vice-President of Rape as War Crime – "Historic Moment"' Available at: https://www.amnesty.org.uk/press-releases/icc-conviction-former-congolese-vice-president-rape-war-crime-historic-moment (Accessed April, 2020)

to be convicted on the basis of command responsibility."[776]FatouBensouda in the following words:

> "highlighted the critical need to eradicate sexual and gender-based crimes as weapons in conflict by holding accountable those who fail to exercise their duties and responsibilities that their status as commanders and leaders entail."[777]

At the very least, the judgment can serve as a form of deterrence to those who hold commanding positions in the armed forces, given that they can be held for being irresponsible or for the irresponsible acts of their subjects.

Regarding the controversy surrounding the subject of consent, the verdict established that a "victim's lack of consent is not a legal element of the crime of rape under the Statute."[778] According to the verdict, a strict requirement to prove the consent of the victim who was violated "would, in most cases, undermine efforts to bring perpetrators to justice."[779]Grewal has noted that"While consent in the context of rape laws has sometimes been a problematic concept, it has also been seen as a key means of recognizing the right of an individual to exercise freedom of choice and control over one's body and life."[780]The view expressed here reflects the definition offered in the *Kunurac* case, which recognises that victims in war situations would not have the opportunity to decide and thus consent was largely negated. In the Boko Haram conflict, this study has identified how the Nigerian military and the CJTF members usually used force and threats to rape women and girls, and exploited their condition to coerce women into becoming their girlfriends which makes them available at any given time for sex.[781]

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[776]Karsten Nora "Distinguishing Military and Non-military Superiors: Reflections on the Bemba Case at the ICC" (2009) 7(5) *Journal of International Criminal Justice*, 983at 1004

[777] Statement of the Prosecutor of the International Criminal Court, FatouBensouda, regarding the conviction of Jean-Pierre Bemba; available at: https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-bemba-21-03-2016 (Accessed April, 2020)

[778]*The Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/05-01/08 para105

[779]*Ibid* para105

[780]Grewal K., 'The Protection of Sexual Autonomy under International Law: The ICC and the Challenge of Defining Rape' (2012) 10 *Journal of Criminal Justice*, 373at 383

[781]Dalori Camp interview, December 2017

Rape is likely to occur in four difference situations as outlined in the Elements of Crimes. The first three situations include "force," "threat of force or coercion," or "taking advantage of coercive environment."[782] Consent was only noted in the fourth; "against a person incapable of giving a genuine consent."[783] The Court moved on to explain that Elements of Crimes defines persons "incapable of giving consent as those affected by either natural, induced or age related incapacity.[784] This acknowledges that there are certain persons that, regardless of the situation, are completely unable to give consent. This is in simple contrast to the *Kunurac* definition, which stressed the need of the overpowering of a victims' free will through coercive environment. Therefore, as noted by Clark, Elements of Crimes made a clear distinction between situations and consent, which the *Bemba* judgment emphasized.[785] This is because, as noted by the Court, in the first three situations the prosecutor is not required to prove the victim's absence of consent.[786] In general terms, it is the observation of this study on the difficulty involved in the definition of rape, especially in regards to the idea of "proving consent," this study instead suggest that, a single definition which concentrates on the coercive circumstances of the act is more likely to achieve the ends of containment of sexual violence that one which will constantly require the Prosecutor to prove that the victim did not give consent to the act. Because these arguments on consent will continue to cause unnecessary delays and lose of hope by the victims in the legal system.

4.3.7 Who is a Victim of Rape?

As analysed above, the definition of rape would not be meaningful unless we understand who the victim of rape is. The understanding of a victim of rape would also help legal scholars and even judges in awarding the most suitable form of reparation and access to both local and

[782] *The Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/05-01/08 para106
[783] *Ibid* at para 107
[784] The ICC Elements of Crimes, Available at: https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf (Accessed April, 2020) 5 at10
[785] Janine N Clark "First Rape Convection at the ICC: An Analysis of the Bemba Judgement" (2016) 14(3) *Journal of International Criminal Justice*, 667
[786] *The Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/05-01/08 para106

international mechanisms for adjudication. The term has been used at a general level by the Rome Statute to refer to "persons' and 'non-persons' who have suffered as a result of the commission of any crime under the jurisdiction of the court."[787] The UN has also adopted a broad approach to the definition of victims to include persons that encountered: physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights."[788]

Moffett argues that victimhood should be based on the effect of the act on the individuals and groups who may suffer it.[789] While many studies have largely focussed on direct or primary victims (those that are directly involved in the case of rape),[790] this study is also concerned with effect of rape on other classes of victims such as secondary and tertiary. Therefore, those who are adjudged as close to the primary victim of rape such as family members love ones of the victim and dependants of the primary victim are categorised as secondary victims.[791] On the other hand, tertiary victims can be members of the victim's immediate community who can feel the effect of the damage to a member of their social community (social club, group etc.).[792] Legal scholars justify the effect of the damage on these three layers of victimisation to enable the appropriate form of reparation that should be given to each according to the class of victimhood. Moffett makes the point more succinctly:

> "The distinction can help to provide appropriate remedies to different groups of victims, such as compensation, restitution, and rehabilitation to the primary and secondary victims, to collective reparations and non-recurrence measures for tertiary victims."[793]

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[787] Rule 85(a) and 85(b), UN General Assembly, Rules of Procedure and Evidence of the ICC
[788] UN Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: Adopted and Proclaimed by General Assembly Resolution 60/147 of 16 December, 2006. Available at: https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx (Accessed April, 2020)
[789] Moffett Luke *Justice for Victims before the International Criminal Court* 1st Ed (Routledge, 2014) 18
[790] Mawby R. and Walklate Sandra *Critical Victimology: International Perspectives* 1st Ed (Sage Publications, 1994) 48 at 51
[791] Anne-Marie De Brouwer "The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes" (2015) 48 *Cornell International Law Journal*, 641
[792] Carolyn Hoyle and Lucia Zedner, Victims, *Victimisation and Criminal Justice*, In Maguire M., Morgan R., and Reiner R., *The Oxford Handbook of Criminology*, Ed (Oxford University Press, 2007) 470
[793] *Supra*, note 789 at18

As demonstrated by this research, women and girls who have experienced forced displacement, arbitrary incarceration in Giwa barracks, starvation for the purposes of rape as well as other grave violations of human rights and international humanitarian law have a right to reparation.[794] Therefore, women and girls who were victims in the Boko Haram conflict should be provided with full and effective reparation, including restitution, rehabilitation, compensation and assurance of non-repetition.[795]

4.4 The Prohibition of Sexual Violence in International and Non - International Armed Conflicts

The Lieber Code appears to be the first legal instrument within the scope of international humanitarian law to prohibit rape in explicit terms. Specifically, paragraphs 44 and 47 of the Lieber Code noted the outright prohibition on not only rape but other forms of crimes as quoted below:

> "(...) all rape (...) by an American soldier in a hostile country against its inhabitants (...) under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense."[796]

However, it is important to note that Common Article 3 of the Geneva Conventions did not contend outright prohibition against rape. But it mentioned prohibition against "violence to life and person" including cruel treatment and torture and "outrages upon personal dignity."[797] Thus it could be argued that Third Geneva Convention required those who are taking prisoners to ensure their honour and dignity is respected.[798]

Further, Additional Protocols I and II firmly prohibited "at any time and in any place whatsoever, whether committed by civilian or by military agents" certain acts including

[794] UN Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: Adopted and Proclaimed by General Assembly Resolution 60/147 of 16 December, 2006. Available at: https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx (Accessed April, 2020)
[795] *Ibid* Article 18
[796] Roberts, Adam. "Foundational Myths in the Laws of War: The 1863 Lieber Code, and the 1864 Geneva Convention" (2019) 20 *Melbourne Journal of International Law*, 158 at 159
[797] Geneva Conventions, common Article 3
[798] Third Geneva Convention, Article 14, first paragraph

"outrages upon personal dignity."[799] Thus, more interestingly, Additional Protocol II noted that this condition to respect the personal dignity of all persons must also include acts committed during terrorist attacks as captured in Article 4(2) (d).[800] While a further prohibition on rape appears in strong terms in Article 4(2) (e) that: "Outrages upon personal dignity in particular, humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault."[801]

The drafters of the First Additional Protocol noted in Article 75 the scope of the prohibition including "Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault."[802]As stated above, rape has appeared boldly in Additional Protocol II, specifically in Article 4(2) (e).[803] Understanding the gravity of the offence of rape and the need to shield vulnerable populations from its threat, the Fourth Geneva Convention mandates the protection of women and children. This is provided in Article 27, which reads that "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[804] Similarly, Articles 76 and 77 of the Additional Protocol II noted the need for parties to the conflict to ensure equal protection for women and children respectively. In both the Fourth Geneva Convention and Additional Protocol I, did not only mention rape but enforced prostitution and other forms of indecent assault on the dignity and honour of persons. It is also important to note that the aforementioned namely "rape, enforced prostitution and any other form of indecent assault" on the dignity and honour of persons have been categorised as war crimes under Article 4(e) of the Statutes of the International Criminal

[799] Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law Vol. II: Practice* (Cambridge University Press, 2005) 2108 Additional Protocol I, Article 75(2) para 996; Additional Protocol II, Article 4(2) para 997
[800] Additional Protocol II, Article 4(2) (d)
[801] Additional Protocol II, Article 4(2) (e)
[802]Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law Vol. II: Practice* (Cambridge University Press, 2005) Additional Protocol I, Article 75(2) 2108 at para 996
[803]*Ibid* Additional Protocol II, Article 4(2) para 1559
[804]*Ibid* Fourth Geneva Convention, Article 27, second paragraph at para 1556

Tribunal for Rwanda.[805] Also, Article 3(e) of the Special Court for Sierra Leone prohibited these acts and declared them as war crimes.[806] Some have argued that the language adopted in the prohibition in the Common Article 3 "outrages upon personal dignity" and "any form of indecent assault" can be interpreted to mean sexual violence.[807]

Following from the Statute of the International Criminal Court, "committing rape, sexual slavery, enforced prostitution, forced pregnancy … enforced sterilization, or any other form of sexual violence" can be seen as grave violation of the provisions of the Geneva Conventions. Again, some have extended the interpretation base on the provisions of the ICC Elements of Crimes Article 8(2) (xxii) and Article 8(2) (e) (vi)-1 both noted that "Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions"in both international and non-international war scenarios.[808] Further, "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" has been pronounced as a crime against humanity in Article 7(1) (g) of the Statute of the International Criminal Court and "rape" measures up as a crime against humanity going by the position of the Statutes of the International Criminal Tribunals for the former Yugoslavia, (Article 5g) and Rwanda (Article 3g).[809]

In the legal lexicon, a substantial number of military manuals do not only prohibit the acts of "rape enforced prostitution and indecent assault are prohibited" but also see them as

[805] *Ibid* ICTR Statute, Article 4(e) and Article 4(c) para 1577
[806] *Ibid* Statute of the Special Court for Sierra Leone, Article 3(e) at para 1569
[807] *Supra*, note 295 at 264
[808] Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law Vol. II: Practice* (Cambridge University Press, 2005) ICC Statute, Article 8(2)(b)(xxii) and 8(2)(e)(vi)-1 at 2191 at para 1565
[809] *Ibid* ICC Statute, Article 7(1) (g) at para 1564; ICTY Statute, Article 5(g)

war crimes.[810] Interestingly, the Nigerian military also proclaimed that these acts are prohibited as they all add up to war crimes. Even the country's constitution noted that rape is illegal. This has appeared in section 357 of the Criminal Code Act, CAP 77, LFN, 1990.[811]

Most states have been vocal critics of the violations of the laws governing wars and particularly the prohibition relating to rape and other forms of sexual violence.[812] As with States, international organisations have also been in the forefront in the campaign against rape and sexual violence in both peace and war times. One clear example of the United Nations campaign against rape and sexual violence was the joint condemnation of rape by the Security Council, General Assembly and the Commission on Human Rights when it became glaring that soldiers engaged in rape related activities in the Rwandan,[813] Sierra Leonean,[814] Ugandan[815] and the conflicts in the Former Yugoslavia.[816] Even the Former Yugoslavian controversial position was later upturn when international pressures mounted that: "It is significant that in 1993 Yugoslavia acknowledged in its report to the Committee on the Elimination of Discrimination Against Women that abuses of women in war zones were crimes contrary to international humanitarian law and apologized for an earlier statement giving the false impression that rape was considered normal behaviour in times of war."[817]

One can argue that rape remains prohibited even from the perspective of human rights law when one considers the extend of prohibition on related violations such as torture and

[810]Ebo, Adedeji Towards a code of conduct for armed and security forces in Africa: Opportunities and Challenges: Geneva Centre for the Democratic Control of Armed Forces, 2005. Available at: https://www.files.ethz.ch/isn/14057/PP5_Ebo_ENGLISH.pdf (Accessed March, 2020)

[811] Section 357 of the Criminal Code Act, CAP 77, LFN, 1990"Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of false threats or intimidation of any kind, or by fear of harm, or by means of false or fraudulent representation as to the nature of the act, or in the case of a married woman, by personating her husband is guilty of an offence called rape

[812]*Supra*, note 132; See for example the statements of Germany at Paras 1665-1666, United States at Paras 1672-1673 and Netherlands at paras 1667

[813] UN General Assembly, Res 51/114, 12 December 1996 at 3

[814] UN Security Council Statement by the President, UN Doc S/PRST/1998/13, 20 May 1998

[815] UN Secretary General Assistance to unaccompanied Refugee minors Report, UN Doc A/53/325, 26 August 1998, para 20

[816] UN Security Council, Res. 798, 18 December 1992, Preamble S 2

[817] Yugoslavia, Statement before the Committee on the Elimination of Discrimination Against Women, UN Doc A/48/39, 12 April 1994, 761at769

cruel, inhuman or degrading treatment or punishment. Following from this rationale, the European Court of Human Rights has ruled the rape of detainees as amounting to torture.[818] Specifically, in the *Aydin v. Turkey* case, the rape of detainees was seen as equal to torture.[819] In this light, the failure to provide enough food and healthcare to detainees for the purpose of raping their victims and Giwa barracks violates prohibition on torture.[820]Similarly, since the 1970s, the Inter-American Commission on Human Rights referred to rape of detainees in the light of torture.[821] Therefore, rape can be treated as an element of torture under human rights law. Besides, the European Court of Human Rights rejected certain practices where prisoners were treated without respect to their human dignity. In the case of *Valasinas v. Lithuania,*[822] the Court "found the strip-searching of a male prisoner in the presence of a female prison officer to be a degrading treatment."

Discrimination based on gender has been qualified as gender-based violence by the Committee on the Elimination of Discrimination against Women.[823] There is an increase in the number of legal instruments that treat the trafficking of women and children with the sole purpose of prostitution to be a criminal offence.[824] Likewise, there are appreciable number of organisations and instruments advocating for severe punishment of those who are found responsible for the offence of sexual violence.[825] As one author concludes, "the prohibition of using sexual violence as an official punishment is clear; not only is such a punishment not

[818] Klerk, Yvonne S. "Supervision of the Execution of the Judgments of the European Court of Human Rights: The Committee of Ministers' role under Article 54 of the European Convention on Human Rights" (1998) 45(1) *Netherlands International Law Review*, 65 at 86
[819]*Aydin v. Turkey* (1997) ECHR Judgement, 25 September para 83
[820]Interview with Amnesty International Abuja, October 2017
[821]Kärnä Sara "The right to reparation for conflict-related gender-based violations of international law: The individual's right to reparation in international humanitarian law and human rights law applicable in Africa" (2020)
[822]*Valasinas v. Lithuania*, (2001) ECHR Judgement (Merits and just satisfaction) paras 117–118
[823]R.J.A, McQuigg, "The CEDAW Committee and Gender-Based Violence against Women: General recommendation No. 35" (2017) 6(2) *International Human Rights Law Review*, 263 at 278
[824] Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Conventions against Transnational Organised Crimes (November 2000)
[825] Article 4 on the Declaration of Elimination of Violence against Women Proclaimed by UN General Assembly Res. 48/104 of 20 December 1993; European Court of Human Rights : *S. W. v. UK* (1995) ECHR Judgement, at paras 43-45

officially provided for by States, but also any confirmed reports of such an incident have either been denied or the relevant persons prosecuted."[826] Therefore, Rule 93 whether in international or non-international armed conflicts, acts of sexual violence are not permissible.

4.4.1 A Hidden Atrocity of Sexual Violence in Nigeria's Boko Haram Armed Conflict

Sexual violence appears to be one of the most prevalent crimes in conflict situations but it has not received sufficient legal recognition across the world.[827] In the North-eastern region of Nigeria where Boko Haram has been operating since 2009, sexual violence has become endemic, yet little or nothing has been done toward the prosecution of the offenders. While it is understood that "Boko Haram has adopted sexual violence as an instrument of war,"[828] it is difficult to comprehend why the prosecution of the perpetrators is proving difficult. In fact, the group's abduction of 276 young girls at Chibok in Borno State has sparked many reactions from the international community "largely due to the number and age of the girls involved."[829] It is also important to note that the group has committed other severe forms of sexual violence apart from the abduction of the Chibok girls. Accordingly, the Amnesty International has contended in its report that over "2000 women and girls have been captured and forced into slavery by Boko Haram in a little over 12 months."[830]

Following the pervasive cases of sexual violence, human rights institutions had recommended the effective prosecution of the group's members for different forms of sexual violence, including "rape, sexual slavery and other forms of sexual violence."[831] There was

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[826] Amnesty International "Women's Lives and Bodies-Unrecognized Casualties of War" Available at: https://www.amnesty.org/en/documents/ACT77/095/2004/en/ (Accessed April 2020)
[827]Christopher W Mullins "We are going to Rape you and Taste Tutsi Women: Rape during the 1994 Rwandan Genocide" (2009) 49(6) *British Journal of Criminology*, 719 at 719
[828]Interview with N/A of January 2018
[829]OriolaTemitope "Unwilling Cocoons": Boko Haram's War against Women" (2017) 40(2) *Studies in Conflict and Terrorism*, 99 at 101
[830]Amnesty International- Boko Haram: 2,000 Women and Girls Abducted; Available at: https://www.amnesty.org.uk/press-releases/boko-haram-2000-women-and-girls-abducted-many-forced-join-attacks-new-report (Accessed May 2020)
[831] Nigeria: It is Past time that the ICC Opens an Investigation; Available at: https://www.amnesty.org/en/latest/news/2019/10/nigeria-is-past-time-that-the-icc-opens-an-investigation/ (Accessed May 2020)

also the incident involving the abduction of another group of 110 young high school girls in Dapchi, a village in Yobe State.[832] As has been revealed, the harsh condition in which they were subjected to while in abduction led to the death of some few of the girls.[833] This is to say that girls are not only abducted but mostly maltreated in a manner that threatens their lives. However, the administration of cruelty in the course of abduction can differ depending on one's faith. Commenting on the Dapchi incident, Akpoghome:

> "Leah Sharibu, who was fourteen years old when she was abducted in February 2019, was not released for failure to renounce her faith. She is still in captivity and has been reported to have been delivered of a baby."[834]

While it is difficult to establish the exact figure of girls and boys that have been sexually violated in the course of the Boko Haram conflict, information into the kind of sexual violence that occur in the camps run by the insurgent group have been narrated by those few who escaped or got rescued by the Nigerian security forces. The following accounts of sexual violence of the victims would enable the reader to appreciate the extent of violation committed by the sect against their victims.

In 2018, a girl of 16 years old named JummaiIliya was rescued at Sambisa forest while vomiting blood. In an interview, she noted that the "terrorists took turns to have sex with her on a daily basis and she ended up being pregnant and was forced into an unwanted marriage."[835] Another lady of 23 years old named Asabe who managed to escape from Boko Haram captivity revealed that she was subjected to rape by 15 men and 15 times almost on daily basis until the period she got the chance to find her way out of the forest.[836] While in other situations; "women have been fought upon in the camps as they are treated as 'food."[837] As a result of the conflict, there has been a significant increase in the cases of sexual violence

[832]Ekpo, Charles E Cletus A, Agorye, and Bright E Tobi "DapChibok and the Alleged Complicity of the Nigerian Security Apparatuses: the Law in the Face of Blame Game" (2018) 1(1) *African Journal of Law, Political Research and Administration*, 1
[833]Interview with Amnesty International of October, 2017
[834]Akpoghome, Theresa U, and UfuomaAwhefeada "Challenges in Prosecuting Sexual Violence in Armed Conflict under Nigerian Law" (2020) 11 *Beijing Law Review*, 262 at 263
[835]Dalori IDP Interview of January, 2018
[836]*ibid*
[837]*Ibid*

in the conflict region. In 2018, the United Nations reported that about 1000 were sexually violated in 2017 as against an estimated number of 664 in the year 2016.[838]

The challenge of rape is that it has a psychological trauma which when not properly treated can continue to undermine the productivity and social inclusion of the victim years after the incident.[839]For example, many are being stigmatized years after they have been rescued or escaped from captivity. The case is even worse for those "who return pregnant or with children conceived through rape are usually rejected or forced to choose between their babies and their families."[840]

With the extant knowledge of the group on non-combatant groups, it is expected that they should be subjected to all forms of prosecution but that is not the case. It was Justice Louis Brandeis who noted that "sunlight is said to be the best of disinfectant."[841] This implies that the knowledge of the existence of sexual violence should naturally lead to the prosecution of the perpetrators. However, this has not been the case as justice has not been served to the victims. According to one commentator:

> "Once, we have acknowledged Boko Haram's sexual and gender-based crimes, providing justice to survivors and victims' is a necessary step but unfortunately to date no single member of Boko Haram has been prosecuted for sexual violence."[842]

More serious still, the administration of President Muhammadu Buhari has begun a massive program to grant amnesty to repentant members of the sect, thus betraying any hope of prosecution for sexual violence that is clearly against the spirit of the Nigerian constitution and other relevant international and regional legal instruments. The idea of granting amnesty was meant to be granted only for the crime of participating in armed conflict and does not include crimes committed in the course of prosecuting the conflict.

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[838]UN- Available at: https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/04/report/s-2019-280/Annual-report-2018.pdf (Accessed May 2020)

[839] Nathaniel Danjibo and AdebimpeAkinkuoto "Rape as a Weapon of War against Women and Girls" (2019) 17(2) *African Research Journal*, p ; Also, Jennie E Burnet "Rape as a Weapon of Genocide: Gender, Patriarchy, and Sexual Violence in the Rwandan Genocide" (2015) 13 *Georgia State University*, 1

[840]Interview with Amnesty International of October 2017

[841] Sunny Press, Available at: https://www.sunypress.edu/pdf/61429.pdf10

[842] Interview with International Rescue Committee of January 2018

The act of sexual violence including forceful marriages, rape and sexual slavery committed by Boko Haram do not only constitute criminal offence, but it can be treated as a flagrant violation of the human rights of the victims as contended in Chapter Four of the Nigerian Constitution 1999 (as amended). In particularly, Section 33 of the Nigerian Constitution offers to protect the citizens' rights and to protect their dignity. In specific terms, the law guarantees that:

1) No person shall be subject to torture or to inhuman or degrading treatment

2) No person shall be held in slavery or servitude and;

3) No person shall be required to perform forced or compulsory labor

From this, it can be argued that the Nigerian Constitution did not consider sexual violence in specific terms. However, sexual violence can be accommodated under severe cases of violation of human dignity under the same provision, especially following the logic of jurisprudential interpretation. Therefore, the group members can be said to have violated constitutional provisions related to sexual violence and should be prosecuted as required. As stated earlier, no single member of Boko Haram has been prosecuted for sexual violence and the same goes to members of the Nigerian security forces and the Civilian Joint Task Force.[843] Also, there is no record of proper investigation of sexual violence committed by the sect or government security forces and the Civilian Joint Task Force.[844]

4.4.2 Abduction of Women and the Chibok Girls

The group's strategies against the Nigerian government also involve the "abduction of women and the systematic targeting of schools."[845] From 2009 when Boko Haram became brutal, it has engaged in several cases of abduction of women and men (mostly children). The most popular of the cases of adduction in recent years has been the case of about 276 girls known

[843]Interview with AG Abuja of December, 2017
[844]Interview with AG Abuja of December, 2017
[845]Anonymous Interview, 6-1-2018

within the international media as "Chibok girls."[846] It has been argued that the manner of treatment of women by the group in Nigeria is similar to the horrible report of ISIL's treatment of the Yazidis in the Middle East.[847] However, there are different reasons why Boko Haram targeted the Chibok Girls, some of which are analysed below. In all, there are about three fundamental reasons namely; schoolchildren, Christians, or under the auspices of the Nigerian government.

First, it is possible that the group's target of Chibok girls was borne out of the desire to promote its "principle to end Western education."[848] This explains why the group has engaged in what Human Rights Watch described as "systematic targeting of schools, destroying 211 schools in Borno, twenty-one schools in Yobe, as well as attacking the Federal Government College and an agricultural college."[849] Many lives have been lost as a result of the attacks with damaging repercussion on the education sector which was already strained.[850] It is the conviction of the sect that their attacks on schools would discourage Nigerians from sending their children to orthodox schools if it was successful in mass abduction and sustained attacks.[851] However, one kind observer who has been in the frontline of the war in the North-Eastern part of the country noted that:

> "The motive is clear that they intend to scare people from sending their wards to Non-Koranic schools, they also intend to engage in forced conversion of the abductees.
> This - explains why they forcefully marry the young girls and rape them violently."[852]

Some have argued that the group's targeting of the Chibok girls can be given a religious consideration. Chibok is a small town populated by Christian minorities in Borno State and the group's consistent raiding of the town has made others to offer a religious interpretation to

[846] Human Rights Watch "Those Horrible Weeks in their Camps: Boko Haram Violence against Women And Girls in North Eastern Nigeria" Available at: https://www.hrw.org/report/2014/10/27/those-terrible-weeks-their-camp/boko-haram-violence-against-women-and-girls (Accessed May 2020)
[847] Mohammed Bin Ali "ISIS and Propaganda: How ISIS exploits Women" (2015) *Reuters Institute for the Study of Journalism,* 10 at11
[848] Peters Michael "Western Education is Sinful': Boko Haram and the Abduction of Chibok Schoolgirls" (2014) 12(2) *Sage Journals,* 186at190
[849] *Supra*, note 789 at 17
[850] *ibid*
[851] *Ibid*
[852] Anonymous Interview, 8-2-2018

their intention.[853] This religious card fits into the narrative especially that over 75 percent of the abducted girls were Christians.[854] Besides, some have noted that that the few Muslims among the girls were given preferential treatment as some were allowed to leave while their Christian fellows were said to be given the "choice of converting to Islam or facing conditions of domestic servitude, whereas the militants allowed most Muslim abductees to leave."[855] However, a closer look at the events suggests that almost all the girls were subjected to some form of sexual violence as they were forcefully married off to insurgents and some sold in distant lands:

> "It is easy to upturn any little thing into a religious game in Nigeria. For anyone who is familiar with the country, it has always been sensitive to matters of religion for understandable reasons. However, the case of the Chibok girls does not fit into this simplistic narrative. There were other cases of abductions and forced marriages by the group against fellow Muslims. The group has been brutal to both religions as it has thrown bombs on both Christian and Muslim worshippers. The least in the calculation of the group's intention is religion even though it professed the intention to establish an Islamic Caliphate."[856]

A rational explanation that fits into the group's agenda of targeting the Chibok girls is "to pay back the Nigeria government, which had engaged in a campaign of targeting the wives of Boko Haram leaders."[857] It is popular knowledge that the Nigerian government on many occasions attack the families and relatives of the group's members as a way of neutralising them or weakening them psychologically.[858]One participant noted the following:

> "On many occasions, the security forces are seen to humiliate by way of incessant arrest of wives of the insurgents with the objective to make them surrender their attacks against the Nigerian government and other soft targets. It is possible that most of these women are completely innocent of the activities of the group members. But we are in a country in which its security forces are its own authority."[859]

In any case, the group has subjected women to various forms of sexual violence. There are those who were forcefully married off to fellow members of the group while others were

[853] Anonymous Interview, 8-12-2017
[854] Smith, Daniel Jordan "What Happened to the Chibok Girls? Gender, Islam, and Boko Haram" (2015) 13(2) *Hawwa Journal of Women of the Middle East and the Islamic World*, 159at165
[855]*Supra*, note 147
[856]Anonymous Interview, 5-1-2018
[857]Maiangwa Benjamin and Daniel Agbiboa "Why Boko Haram Kidnaps Women and Young Girls in North-Eastern Nigeria" (2014) 3*Sabinet African Journal*, 51at 56
[858]William Hansen "The Ugly face of the State: Nigerian Security forces, Human Rights and the search for Boko Haram" (2020) *Canadian Journal of African Studies*, 2
[859]Anonymous Interview, 6-1-2018

converted to slaves, working for the group's interest and also satisfying their sexual desires. In the following, we will analyse the basis on which elements of the Rome Statute can be applied to prosecute the members of the Boko Haram for violations relating to rape and other forms of sexual violence.

4.4.3 Prosecution of Sexual Violence through the International Criminal Court

Through the principle of the complementarily, the International Criminal Court (ICC) canbe able to prosecute cases that the Nigerian government have been unwilling or incapable to prosecute such as the case of the violations of the Boko Haram group. In the case of Boko Haram, the ICC can, if proven, prosecute the leader of Boko Haram, Abu- Shekau, for genocide of rape under Article 2(b) of the Genocide Convention.[860]

Following from the above, the prosecutor would ensure that the leader of Boko Haram responsible for acts of rape provided under Article 7(1) (g)-1, which contend crimes of "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."[861] On its part, the Court is expected to establish each component of Article 7(1)(g)-1.

With regard to the provisions of Article 7(1)(g)-1 the victims (who in this case are the several women that have suffered sexual violence), would establish evidence of physical invasion. Several of these Boko Haram victims have spoken about their conditions to the researcher and some have opened up to international organisations in Nigeria.[862] Some of the victims have been evacuated to abroad for mental treatment and they can offer substantial evidence of rape during abduction by the group.[863] It is significant to note that the court only

[860] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948. Article 2(b) -"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: b) Causing serious bodily or mental harm to members of the group.

[861]Rome Statute, Article 7(1) (g)-1

[862] Anonymous interview at Dalori Camp, Maiduguri 2018; International Rescue Committee and Amnesty International

[863]OriolaTemitope, "Unwilling Cocoons": Boko Haram's War against Women" (2017) 40(2) *Studies in Conflict and Terrorism*, 99 at 121

used twenty-seven witnesses to convict the defendant in the *Akayesu* case.[864] Although the prosecutor, like in most cases has the higher burden to show evidence of "penetration," the fact that most of the women abducted were impregnated shows that the group's purposes of "abduction cannot be separated from engaging the women in some form of sexual gratification."[865]

With regards to the second part of Article 7(1)(g)-1, it is expected that the prosecution would prove the occurrence of coercive action in a coercive environment. It would be easy for the court to find the existence of coercion considering the manner of their evacuation and how they were subjected to all forms of humiliation in the hidden camps in Sambisa Forest. This is aside, the widespread killings and slaughtering of other victims to frighten them from daring to escape. The Court had once ruled in the *Gacumbitsi* case that the threat to kill women who seek to resist was said to have "vitiated consent."[866] Clearly, Boko Haram has exercised complete control and command over their captives (women, children and other vulnerable groups). As a result, they decide their movements and choices. It is based on this observation that Gavin argued that the group used "rape as a weapon of war."[867] However, if the Court takes the path of *Semanza,* it may require rigorous processes of verification of individual cases with the aim to establish consent. But from the line of cases after *Semanza*, such as *Gacumbitsi and Bemba*it does not seem that the court will follow in that order.

Following from the analysis, one can argue that the chain of command and control of the enslavement and mass abduction of women by Boko Haram leading to rape is more like an established military institution of a state.

[864]*Akayesu,* Case No. ICTR-96-4-T, Judgment, para 696
[865] Anonymous Interview, 3-1-2018
[866]*Gacumbitsi,* Case No. ICTR-2001-64-A, Judgment, at para 48
[867]Gavin, Helen. "Violent Crime as old as the Bible: Boko Haram uses Rape as a Weapon of War" The Conversation (2015)

4.4.4 Application of the Genocide Convention

Once the prosecution substantiates claims of the existence of rape, it is expected that the Court would entertain the more challenging case – to further argue that the various instances of rape of the abducted women amounted to genocide. At the very least, the Court should be able to establish that the leaders of Boko Haram nursed the agenda to cause serious bodily suffering and mental harm to the Chibok people and other minorities within the North-Eastern region as envisaged under Article 2(b) of the Genocide Convention by means of rape with the main objective to destroy them through same measure (Rape).

In order to establish Boko Haram's main objective to cause suffering and serious bodily harm to the abducted Chibok girls in the North-East Nigeria, the prosecution may consider available facts. To begin with, the insurgents normally present the abductees with two choices – conversion to Islam or remain a slave.[868] This implies that the group's punishment to those who refuse conversion to Islam is to continue being a slave till death.[869] Recently, Gavin opined that:

> "Most of those kidnapped by Boko Haram are from Christian homes, but were reportedly forced to convert to Islam. Women and girls were also forced into marriage, and there are reports of people being sold into slavery. Amnesty International estimates that more than 2,000 women and girls were abducted by Boko Haram in 2014."[870]

Secondly, the occurrence of sexual violence on its own can be interpreted as the causing of serious bodily and mental harm to the victim.[871] Another important factor to present before the court is the fact that Boko Haram's attack of Chibok, unlike in other cases of their attacks, is to enslave the people because of their religion and identity, just like the case of the Yazidis being attacked and enslaved by the ISIL.[872] This should also involve a claim of killings of

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[868] International Refugee Committee: Interview of 16 October, 2017

[869] *ibid*

[870] Gavin, Helen. "Violent Crime as Old as the Bible: Boko Haram uses Rape as a Weapon of war" The Conversation (2015) Available at: https://theconversation.com/violent-crime-as-old-as-the-bible-boko-haram-uses-rape-as-a-weapon-of-war-41470 (Accessed May 2020)

[871] Hasian, Jr, Marouf "Remembering and forgetting the "final solution": A rhetorical pilgrimage through the US holocaust memorial museum" (2004) 21(1) *Critical Studies in Media Communication*, 64 at92

[872] McCausland, Courtney. "From Tolerance to Tactic: Understanding Rape in Armed Conflict as Genocide" (2017) 25 *Michigan State College of Law International Law Review*, 149

women who resisted abduction or resisted rape when abducted. This should qualify the glaring existence of a grand intent to cause bodily and mental harm to the Chibok people and other minorities. In seeking to convince the Court of Boko Haram's grand objective to cause the destruction of Chibok people and other minorities within the North-Eastern region, the prosecution can produce convincing facts based on Boko Haram's own confessional statements.[873] It is possible to present to the Court clear messages targeted at Chibok by Boko Haram leaders in Hausa and Kanuri languages.[874]

It is customary for the Court to make a decision based on what is presented before them, including whether the Chibok girls and other abductees can live freely, practicing their culture under Boko Haram rule. No one needs extra effort to know that the Chibok girls and other abductees do not enjoy freedom, not of their right to self-preservation. Even the basic freedom of movement and worship is denied. From the foregoing, the fundamental reason why Boko Haram needs the Chibok girls and other women abductees is for sexual purposes.[875] It is also important to note that the only thing short of sexual violence is death. The mass killings and bombings are clear evidences that cannot be denied.[876] There is the likelihood for the case to take the tune of Sebrenica where the Court established localised genocide. What implies is that genocide can be local when not all members of the ethnic group are raped or killed?[877] Besides, hundreds of women, if not thousands remained enslaved by the group.

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[873]Bloom Mia and Hilary Matfess "Women as Symbols and Swords in Boko Haram's Terror" (2016) 6(1) *Prism Journal of Complex Operations*, 104at121

[874]AbubakarShekau on Chibok Girls; available at:https://www.youtube.com/watch?v=0PEnWvbyiis(Accessed August 2020)

[875]*Supra*, note - Amnesty International- Boko Haram: 2,000 Women and Girls Abducted; Available at: https://www.amnesty.org.uk/press-releases/boko-haram-2000-women-and-girls-abducted-many-forced-join-attacks-new-report (Accessed May 2020)

[876]Zenn, Jacob and Elizabeth Pearson "Women, Gender and the Evolving Tactics of Boko Haram" (2014) 5(1) *Journal of Terrorism Research*, 46 at 47

[877]de Brouwer, A M "Sexual violence against women during the genocide in Rwanda and its aftermath" In Solace Ministries International Conference, vol. 30 2007

While the factors analysed above are grounds for prosecution, below we will examine whether there is credible evidence to charge the Boko Haram members for the factors analysed or for non-genocide crimes provided for in Article VII of the Rome Statute.

4.4.5 Rape as Genocide in light of the Boko Haram Armed Conflict

Considering the position of Article VI of the Rome Statute which defines genocide as acts that are committed by a group "with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group,"[878] it will be difficult to prosecute the group's leader for rape as genocide. Because, it is understandable that some of the group's members might have been responsible for some incidents of rape or engaged in forced marriages and other forms of sexual violence. However, it will be difficult for the prosecution to establish the most essential requirement to show clear evidence that will indicate that the group committed those acts with the sole intent of "destroying, in whole or in part, a national, ethnic, racial, or religious group."[879]

Perhaps the most challenging question for the prosecution will be to establish the grounds to convince the Court that the sole intent of the actions of Boko Haram is specifically targeted at a certain group. This will particularly be problematic because the message(s) of the group have failed to identify a specific group or ethnicity. One observer noted that "Boko Haram has communicated multiple different messages"[880] and for that, it will be highly unlikely to convince the Court over the identity of the target group or ethnicity. The central message of the group has been to target 'symbols of Western civilisation.' A participant summarised the group's target as follows:

> "Can we say they are after the Yoruba, Igbo or even Hausa/Fulani people? Or the minority group that occupy the middle belt region of Nigeria? Such a question can be difficult to attempt considering the fact that the group has attacked all groups including the Kanuri ethnic where the leaders of the group

[878] Article VI of the Rome Statute
[879] As required and provided for in Article VI
[880] Hakeem Onapajo and Abubakar A Usman "Fuelling the Flames: Boko Haram and Deteriorating Christian-Muslim Relation in Nigeria" (2015) 35(1) *Journal of Muslim Minority Affairs*, 106 at 108

> come from. But we can hold unto the main message which their name is derived from. That is to say, the group's target is western civilisation."[881]

For this main reason, the group has attacked school children, worship centres including Mosques[882] and government buildings not excluding the UN building in Abuja.[883] However, some have argued that the main intention of the group is to eliminate Christian population in the region.[884] Arguably, the group has rendered many Christian communities homeless. If it becomes clear that the various attacks in the Middle Belt region are undertaken by the group, then one would have no reason to doubt that the Christian population may be the real target of Boko Haram. As one author noted:

> "Targeting Christians might work, but the evidence is unclear as to whether that is happening."[885]

While it is true that Christians have been targeted by the group in many of its attacks, it is equally important to note that Muslim population, including their places of worship have not been spared. Responding to the question of whether the group sees the Muslims as part of its community, one respondent noted that:

> "Initially, we thought that the group emerged to defend the Muslims as part of the confrontation that has been taking place between Muslims and Christians, but with the passage of time, that believe has been upturned. The group has targeted and killed many Islamic scholars and used suicide bombers to kill Muslims. I can tell that we (referring to Muslims) have suffered more from the activities of Boko Haram than the people of other faiths."[886]

Similarly, Nigerian government, especially government institutions and public officers have also constituted a core target of the group.[887] This explains why specific individuals have been targeted and killed as a result of their criticism against the group or support for the government. Pham noted that "there is also evidence that the group has attacked and killed

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[881] Interview
[882]The New Humanitarian "Reporter's Diary: Still on the trail of Boko Haram: How Fear is Shaping an Entire Generation" Available at: https://www.thenewhumanitarian.org/opinion/2019/02/26/boko-haram-northeast-Nigeria-reporter-notebook (Accessed June 2020)
[883]Freedom Onouha and Temilola George "The Abuja Bombings: Boko Haram's reaction to President Buhari's actions" (2016) 25(2) *African Security Review*, 208
[884]GwamnaDogara "A Christian Response to Boko Haram Insurgency in Nigeria" (2018) 3(1) *Journal of West African Theological Seminary*,31 at 33
[885]*Supra*, note 131at 354
[886] Anonymous Interview 5-1-2018
[887]Peter Phem "Boko Haram's Evolving Threat" (2012) 20 *African Centre for Strategic Studies*, 1

non-Christians, including Muslims who support the Nigerian government."[888]However, one can argue that the group has separated Christians and Muslim captives as seen in the Chibok Girls incident.[889] This was the same thing that culminated in the retaining of the only Christian captive, Leah Sharibu who was abducted alongside 110 other girls.[890] But as Sverdlov has argued, "the separation of Christians from Muslims in the case of the Chibok girls is just one incident in six years, rather than a widespread and systematic attack. Therefore, no conclusive evidence that Christians are the specific group that Boko Haram is after exists."[891]

What happens in the event that the Court establishes that the Christians are the main target of the group's activities? The next challenge will be to establish again whether such intent was in "whole or in part"[892] When this becomes the case; there is the likelihood for the court to draw some lessons from the ICTY which noted that there is the possibility of localised genocide that led to the convictions of war criminals on the Serbian side.[893] But the question that would arise from here is to determine the extent of a localised genocide. Can we argue that the various kidnappings of more than three hundred school girlsfall within that judgement? To answer such question, we also need to be reminded that more than half of the girls have been forcefully married off, a condition that is "similar to those that made up the genocide claims in *Gacumbitsi*."[894] Is it possible for the court to stretch the definition of genocide to accommodate such type of concerns? This is a good point the Court may wish to consider in the Boko Haram situation.

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[888]*ibid*
[889]Smith, Daniel Jordan "What Happened to the Chibok Girls? Gender, Islam, and Boko Haram" (2015) 13(2) *Hawwa,*159 at 161
[890]Adam Eteete, Michael G. Osah and David O Alao "From Civilization to the Dark Ages: Addressing Violation of Human Rights in Northeast Nigeria" (2019) 58(3) *European Journal of Social Sciences*, 211 at 214
[891]*Supra*, note 749at 354
[892] Article VI of the Rome Statute
[893]Anne-Marie de Brouwer*Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* 1st Ed (Intersentia Publishers, 2005)
[894]*Ibid*, at 54

In the final analysis, it would be difficult for the court to be convinced that the intention of the group is principally to "destroy a people."[895] Similar to the prevailing practice among other insurgent groups, Boko Haram is not directly opposed to Christian belief.[896] In all this, except for the isolated case of Leah Sharibu (who was retained for her faith even when her fellow captives whom she was abducted with, have been released), the group have not engaged in forced conversion of its abductees. But, it has engaged in sexual violence of all its abductees. However, it is equally important to note that the group "makes Christians face roadblocks to practicing their religion, not an outright prohibition."[897] This implies that isolated maltreatment of Christian abductees and victims of the conflict by the insurgent group can hardly be qualified as genocide.

That as it may, prosecutors can succeed on other fronts since the claim of genocide can hardly scale through. It is possible that the insurgent group can be prosecuted on the two grounds all of which are derived from the Rome Statute. First, the group can be prosecuted for committing crimes against humanity as spelt out in Article 7 (1) (g) of the Rome Statute which reads that crimes against humanity that include "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."[898] Or as provided under Article 7 (1) (k) which reads "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[899] Perhaps, the group can also be prosecuted for committing war crimes as captured in Article 8(2) (a) (iii). However, it will be difficult for the ICC to indict

[895] Article VI of the Rome Statute
[896] Iheanacho N Ngozi "Boko Haram and Renascent Clogs in Muslim-Christian Relations in Nigeria" (2016) 10(2) *African Research Review*, 47
[897] *Supra*, note 749 at 354
[898] Article 7 (1) (g) Rome Statute
[899] Article 7 (1) (k) Rome Statute

the group for crimes of torture under Article 8(2) (a) (ii) as earlier ruling of the same court (Bemba case) has clearly noted that "rape subsumed the allegations of torture."[900]

In the following section, the research will consider the alleged crimes of sexual violence against women and girls in military detention facilities and in the IDP camps by the military and members of the CJTF.

4.4.6 Rape of Starving Women and Girls in the Internally Displaced Camps

Scores of women and girls have described how they were being raped by the military forces and/or the civilian joint task force. Seven women reported that they were raped in Baga camp when they were starving or close to starving. Jamila, a twenty two- year old girl (not real name) informed officials of International Rescue Committee that she was raped after receiving food from a member of the CJTF who then believed is entitled to be 'compensated.' She expressed that:

> "They (the military and CJTF) will give you food and then return back late in the evening around 6pm or 7pm and ask you to come with them… one (CJTF) man came and brought food to me, he returned in the evening, but I hid myself. He came back the following day and asked me to take water to his place and I went. He then shut the tent door and raped me. He said I gave you these things, if you want them we have to be husband and wife."[901]

Larabe, 27 year old lady disclosed that she was raped numerous times after denying having sex with a member of the CJTF. She said:

> "There was a young man who is a CJTF… He came with money and told me he will give me this money if I agree to have sex with him and he will build a shelter for me with zinc. He said I should look at my neighbors, that he did the same with them and built them their shelters."[902]

Laraba explained that she refused to have sex with the CJTF member, and he reacted by beating her. She narrated:

> "Later, a military officer came and was sharing macaroni with the women. When I reached for some, the CJTF flogged me on my back till I fell…"[903]

After some weeks, she said he came back to find her:

[900] *Bemba Gombo*, ICC-01/05-01/08, Judgment, 204-05
[901] Interview with the International Rescue Committee, December 2017
[902] Interview with Amnesty International, Abuja October 2017
[903] Interview with Amnesty International, Abuja October 2017

> "He started raping me with force. I became very ill because there was no food… he (the CJTF) returned to me and said if I had agreed peacefully I wouldn't be going through all this, and I wouldn't need to strive for food."[904]

Twenty four year Talata told NEMA officials that she was raped on two occasions in the camp. She reported:

> "In or around June 2016, I was pregnant, and a military officer raped me. He knew I was three or four months pregnant. He said he saw me three times before. He didn't offer me any food, he called me and I ignored him but on the third day (after I ignored him) he forced me to a room and raped me."[905]

Talata also narrated that another officer raped her when trying to get some water outside the camp:

> "About five of us went together and all of us were raped. The officers took us one by one when we came out of the camp. We informed the other women and they said we won't go out to collect water unless we are in a group of twenty or thirty. We decided to go in large groups so no one can touch us. But when we were just few, they raped us. This has happened to others too."[906]

Few other women also reported that in the months after the camp was created, women were raped when they went to fetch water. The women confirmed that they began going in a large number in order to protect themselves from being raped.

4.4.7 Fear of Reprisal

Men and women who were interviewed explained that if they make an attempt to report or complain about the sexual violence in the camp they risked retribution.

A particular woman who claimed she was raped explained that the perpetrator, a CJTF, had forced at least four other women in the camp to have sex with him. She also stated that the husband of one of those women was in the camp and attempted to complain: "The day that elderly man started talking about it, when he tried to complain, they took him to the prison, we haven't seen him since then."[907]

Another elderly man also said: "Sometimes they will give the women food; sometimes they will force her or threaten to detain her if she tries to complain. They can say she is a Boko Haram wife and detain her. Even if the husband is around, if he says anything, they will say he is Boko Haram and take him to prison… (The sexual violence) is rampant

[904] Interview with Amnesty International, Abuja October 2017
[905] Interview with National Emergency Management Agency, Abuja October 2017
[906] Interview with National Emergency Management Agency, Abuja October 2017
[907] Anonymous Interview, Dalori Camp Maiduguri, January2018

everyone knows about it, just that people don't want to talk about it because they may arrest you or beat you."[908]

4.4.8 Allegations of Rape and Enforced Prostitution against the Security Forces in the Boko Haram Armed Conflict

Rape is a violation of several human rights, including the rights to equality and non-discrimination, to physical integrity, and to the proscription on torture and other ill-treatment. It equally breaches IHL and can amount to a crime against humanity[909] and war crime[910] in non-international armed conflicts. In several instances, the Nigerian forces or members of the civilian JTF have sexually penetrated women and girls in situations where even with consent, would not be valid because the offender created and/or took advantage of coercive conditions that prevailed.[911] This is because, as earlier explained, there are several instances if present, nullifies any consent given. These include force or the threat of force or coercive environments.[912] Coercive situations that negate consent include situations created by the perpetrator, including fear of violence,[913] duress,[914] detention contexts[915] and the abuse of power.[916] Consent will also be regarded invalid where the perpetrator takes advantage of coercive situations that already exist, even if they are not of their own making, such as those already inherent to an armed conflict.[917]

Based on the analysis, the following factor(s) that occurred or were created by the perpetrators in the IDP camps makes the circumstances coercive:

[908] Anonymous Interview, Dalori Camp Maiduguri, January2018
[909] Article 7 (1) (g)-1 of the Rome Statute
[910] Article 8 (2) (e) (vi)-1 of the Rome Statute
[911] *M.C. v. Bulgaria*, Application 39272/98, (2003) ECHR, Para 163
[912] See Article 7 (1) (g)-1 and Article 8 (2) (e) (vi)-1(2), ICC Elements of Crimes,(2010)
[913] See *Supra*, *M.C. v. Bulgaria*, Para 163
[914] See *Supra*,*Prosecutor v. Akayesu*, ICTR-96-4-T, 2 September 1998
[915] *Prosecutor v. Kunarac, Kovac and Vukovic*, IT-96-23 and IT-96-23/1-A, 12 June 2002
[916] *Prosecutor v. Delalic*, IT-96-21, Judgment 16 November 1998, Para 495
[917] *Prosecutor v. Akayesu*, IT-96-4-T, Trial Chamber Judgment Para 688 where the Court noted that military presence among a group of IDPs was sufficient to make the situation coercive

- Military forces and CJTF members could arbitrarily beat women and girls in the camp with impunity, and did that on a regular basis, and the women knew if they decline sex- they could be whipped;
- Food, water and health care facilities in the IDP camps were very insufficient that women and girls were forced to submit to demands for sex to get food and water for themselves and their family members to survive;
- In some instances, women and girls were constrained to their camp in a situation related to conditions of detention and soldiers and the CJTF take advantage of their incarceration;
- The Nigerian security forces and Civilian JTF members acted in an official capacity and exercised excessive power and resources over the women; and;
- There was an ongoing armed conflict and all the incidents that occurred in the IDP camps originated as a result of the Boko Haram armed conflict.

The military officers along with members of the CJTF, who used force to penetrate women and girls in IDP camps especially in Dalori camp, should be investigated for the offence of war crime[918] and perhaps crime against humanity of rape.[919] Military commanders in charge of Dalori camp should equally be investigated for command responsibility based on the fact that the military forces and CJTF members perpetrated acts of rape openly, and no tangible steps have been taken to ensure those found responsible are held accountable. Similarly, if the members of the CJTF were rewarded, in money or in otherwise, for taking IDP women to the military officers for the purposes of sexual exploitation such as buttering up with the officers

[918] See Article 8 (2) (e) (vi)-3, Rome Statute
[919] See Article 7 (1) (g)-3, Rome Statute

for bringing them girls or women for sex, those involved should be investigated for criminal offence of probably crime against humanity of enforced prostitution.

4.4.9 Torture and other ill-Treatment of Women and Girls in Military Detention Facilities

Data obtained indicates how scores of women and girls interviewed by the National Human Rights Commission and other human rights organizations described how they were being beaten during military interrogations in Giwa barracks, Maiduguri, Borno State.[920]A fourteen year old girl described how she was mercilessly beaten in Giwa barracks after she and other people were being rescued from Boko Haram custody, although she reported that she and friends were abducted by the insurgent group, she expressed that:

> "The military started flogging and hitting us with big sticks saying we are Boko Haram wives. When they started beating us, one officer will come and flog us; later another one will come, beat and leave us. They beat us in every part of our bodies, including our heads- you can even see the scars of the beating all over our bodies…' She narrated how the soldiers before bringing them to the army barrack in their trucks; made them to lie on the road and threaten to run over them."[921]

These women repeatedly claimed that the soldiers or members of the CJTF continually beat them. They described how they are being taken out from their cells blindfolded, their hands tight behind their backs and then beaten with a belt or stick.[922] They explained how inmates constantly fight in their cells due to lack of space and food for themselves and their kids. One victim reported how both of her arms were broken because of beating by the army after she knocked on the door of the cell continuously, begging for water.[923] When the researcher met her in Borno state, she barely lifts her arms well.[924]

International human rights law and international humanitarian law proscribed torture and cruel, inhumane and degrading treatment.[925] There is no situation in which torture or other ill-treatment is permissible. It is a non derogable right under any circumstances,

[920] Interview with the National Human Rights Commission, Abuja October 2017
[921] Interview with the National Human Rights Commission, Abuja October 2017
[922] Interview with the National Human Rights Commission, Abuja October 2017
[923] Interview with the International Rescue Committee, Maiduguri December 2017
[924] Interview with the International Rescue Committee, Maiduguri December 2017
[925] Article 4 (2) (a) Additional Protocol II prohibits at any time and in any place whatsoever 'violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation and corporal punishment…'

including in times of hostilities.[926] The Nigerian Constitution under section 34(1) also prohibits torture and inhumane or degrading treatment.[927] Therefore, the whipping of women and girls reported in Giwa barracks constitute torture or other ill treatment. The reason of incarcerations and constant whippings seemed to have been on the basis of collecting information or statements and/or to punish the women folks for their perceived connection with Boko Haram. The acts of torture were meted out by the military officers or members of the CJTF in an official position with the acquiescence of the Nigerian army.

The brutality of rape and abuse by the military and the CJTF against women and teenage girls; an impact that was further exacerbated by the fact that most of these victims were young and survivors of abduction, forced marriage, sexual violence and other violations by Boko Haram armed group, may potentially amount to torture (beyond other ill-treatments).[928] Acts of rape and the lack of food, water to persons in detention also violate prohibitions on torture and other ill-treatment. In addition, the failure by the security forces to provide persons with information on the status or locations of their family members in custody for a protracted period of time, thereby causing distress and uncertainty, is as well a form of ill-treatment.[929]

4.4.10 War Crime of Torture or Cruel Treatment and the Crime against Humanity of Torture

Torture is a war crime,[930] and when conducted as part of a widespread and systematic assault on civilian population, is a crime against humanity.[931] This study suggests that the acts of

[926]Article 7 of the International Covenant on Civil and Political Rights (1966), provided that 'No one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment…'; Article 2 (2) of the Convention against Torture (1984), which Nigeria ratified in 2001 states that 'Under no circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be used as a justification of torture'

[927]Constitution of the Federal Republic of Nigeria (1999)

[928] See for example, *Ireland v. United Kingdom* (1978) 2 ECHR Para 162 which noted that the age, sex and health status of the victim must be considered in determining the severity limit required for a determination of torture over other forms of ill-treatment…'

[929] See *El Megreisi v. Libyan Arab Jamaihiriya*, Communication No 440/1990, UN Doc CCPR/50/D/440/1990 (1994) Views 23 March 1994, para 5.4

[930] Article 8(2) (c) (i)-3, of the ICC Elements of Crime (2010)

[931] Article 7 (1) (f), of the ICC Elements of Crime (2010)

torture and other forms of ill-treatment described above amounted to the imposition of grave physical and mental distress on those affected, and that these conditions would have been obvious to those managing or in charge of Giwa barracks and the IDP camps. As such, these crimes also call for an investigation by the relevant government authorities for possible international crimes.

4.5 Challenges of Prosecuting Sexual Violence in Nigeria's Boko Haram Conflict

There are many challenges that have been identified to be responsible for inhibiting the prosecution of sexual offenders in conflict situation. To begin with, the national courts and the entire spectrum of the legal system exert significant influence on the enforcement of national and international laws, particularly regarding sexual offences that are committed in the course of armed conflict. States such as Nigeria that have ratified the international legal instruments (Rome Statute of the ICC) have sufficient grounds or legal backing to prosecute sexual violence during period of armed conflict that have been qualified as "war crime, crime against humanity or genocide."[932]The explanation quoted below provides sufficient grounds for national courts to exercise jurisdiction over sexual violence:

> "It is important to observe that addressing accountability issue where it is impossible for the international tribunals to do so would require that the capacity of the national courts to respond to cases of sexual violence in armed conflict be determined to enable it take its position as a court of first instance as the right to investigate crimes committed in times of armed conflict rests with the national courts in pursuance of the complementarity rule as provided in Article 17 Rome Statute of the ICC. The ICC is a complementary Court; national courts remain the basic fora for the prosecution of sexual violence."[933]

The following reasons further furnish the national courts with the position of authority over cases related to sexual violence as explained below.

First, the Rome Statute permits and guarantees State Party to the Rome Statute to be in charge of investigating and prosecuting international crimes that are reported to have been committed in its territory by its own nationals.[934]However, as stipulated in Paragraph 10 of

[932]ICC in Nigeria; Available at:https://www.icc-cpi.int/nigeria (Accessed April 2020)
[933]*Supra*, note 126 p 262
[934] Article 17(1) (a) of the Rome Statute

the Preamble to the Statute, and also in Article 1 and 17(1) of the Statute, until a State Party has been shown to be unwilling and unable to prosecute such crimes, the international community has no role.[935]

Second, State Parties to the Rome Statute are allowed to undertake investigations even if ICC has intervened.[936] Third, most of the familiar cases of sexual violence in "domestic law such as rape, domestic violence, sexual harassment, gang rape and incest do not come under the jurisdiction of the ICC."[937] However, the ICC can prosecute cases related to war crimes, crimes against humanity, genocide and crimes related to aggression as captured in Articles 5-8 of the Rome Statute. Therefore, Nigeria is guaranteed the right to prosecute for sexual crimes or other international crimes if the challenges analyzed below are resolved.

4.5.1 The Inadequacy of Nigeria's Criminal and Penal Codes

One of the major challenges inhibiting the prosecution of sexual offences in the Boko Haram armed conflict has to do with the inadequacy of the criminal and penal codes. In fact, it has been argued that there is no domestic legislation that targets the prosecution of sexual violence in conflict regimes. The Nigerian Penal Codes are basically two – Criminal Code Act and Penal Code meant to be applied in the Southern and Northern regions respectively.[938] One participant noted the following:

> "The evident lack of criminal and penal codes regarding the issue under consideration is a huge lacuna which must be filled if the state must effectively prosecute in conflict situations. The two available penal codes for the two major regions in Nigeria do not contend situations of armed conflict. I think this largely explained why there was no prosecution of defaulters after the Nigerian Civil War."[939]

To be clear, these pieces of legislation are peace time legislations and can be argued against in the courts considering that the cases of sexual violence under consideration are those committed against the victims of Boko Haram armed conflict. Again, one observer noted that

[935]Rome Statute of the International Criminal Court, 1998
[936]Charney Jonathan I "International Criminal Law and the Role of Domestic Courts" (2001) 95(1*) American Journal of International Law*, 120 at124
[937]Ellis S Mark "International Justice and the Rule of Law: Strengthening the ICC through Domestic Prosecutions" (2009) 1(1) *Hague Journal on the Rule of Law*, 79
[938] Timothy F Yerima "Criminal Law Protection of Property: A Comparative Critique of the Offences of Stealing and Theft in Nigeria" (2012) 5(1) *Journal of Politics and Law*, 197 at 199
[939]Interview with Ministry of Justice, Abuja of December 2017

they need to "reflect the new international norms against sexual violence."[940] This implies that the criminal and penal codes available for use in the event of prosecution are largely outdated. One case of this deficiency has been noted by a participant in the following words:"…section 1 of the Violence against Persons Prohibition Act (VAPPA)[941] enacted in 2015 gives a broader definition of the crime of rape and includes males and females but the application of this law is limited to the Federal Capital Territory (FCT) Abuja."[942]

Relying on old laws with limited jurisdiction can be challenging as sexual violence takes different "forms involving so many victims with perpetrators operating in organizational forms as disparate as State armies, Para-Military groups, non-State actors and even the police in peace time as earlier noted and time of extreme violence."[943] From the various cases that have been prosecuted so far in other countries such as Rwanda, it is significant to note that the form, extent and context are important aspect of prosecution by national courts.[944] Besides, because of the need to protect vulnerable people during armed conflict, sexual violence is normally prosecuted as an international crime, especially that it has been perceived variously including as crimes against humanity, war crime and genocide.[945]

However, it is important to mention the fact that existing national courts in Nigeria have the strength and capability to prosecute sexual violence of all kinds including whether it is committed as a domestic or international crime. But this can only be possible when the Criminal, Penal Codes are amended to treat war crimes, crimes against humanity and genocide. Unfortunately, this reform of the existing Criminal, Penal Codes has not been

[940]*ibid*
[941]Violence against Persons (Prohibition) Act, 2015
[942]Interview with Ministry of Justice, Abuja of December 2017
[943]*Supra*, note 225 at 270
[944]Stephanie K Wood "A Woman Scorned for the Least Condemned War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda" (2004) 13(2) *Columbia Journal of Gender and Law*,
[945]Rosemary Grey *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court: Practice, Progress and Potential* (Cambridge University Press, 2019) 97

undertaken in Nigeria. A participant observed the inadequacy of the Criminal, Penal Codes in the prosecution of the sexual violence in the following words:

> "The offence of sexual violence is treated as a mere misconduct and that explains why moderate punishment is given. With increase knowledge of the need to protect human dignity, the two Codes can be amended by the National Assembly to reflect the immediate response against victims of sexual violence. This way, the national courts can respond to the various cases committed by both the insurgent group and the Nigerian security forces."[946]

4.5.2 Lack of Access to Justice and Confidence in the Nigeria Judicial System

It is common knowledge that the entire spectrum of the Nigerian judicial system is largely unpopular and the people do not have sufficient confidence on the system to deliver justice as and when due.[947] In fact, the average person in Nigeria prefers to settle disputes away from the system that is in place for that purpose. Largely, this explains the reason for numerous cases of 'jungle justice' where the people offer instantaneous 'justice' at the crime scene.[948] If the people cannot trust the system of justice in place during peace times, what would happen to case of war time disputes relating to sexual violence? An attempt to answer this question, a participant expressed that:

> "Under normal circumstances (peace times), we do not have trust for the system, therefore, no one should expect miracle during period of armed conflict. We believed that the system is corrupt and inefficient to provide justice. In many cases, you spend years on a single case. I know that many victims of rape or other forms of sexual violence would prefer to keep quiet considering that during war times, survival is the ultimate goal."[949]

The situation is even worse for victims who reside in the countryside, where access to the "legal services may be difficult."[950] Where victims of sexual violence live in far-away distance from a police post, court or any instrument of judicial system, the stress of having to move a long distance in order to table a case can be more difficult. Where the victim is lucky to live close to a police post, priorities are given to "life threatening cases during period of

[946] Interview with National Human Rights Commission of October, 2017
[947] Justus Sokefun and NdukaNjoku "The Court System in Nigeria: Jurisdiction and Appeals" (2016) 2(3) *International Journal of Business and Applied Social Science*, 1
[948] SalihuHabeebAbdulrauf and Hossein Gholami "Mob justice, corrupt and unproductive justice system in Nigeria: An empirical analysis" (2018) 55 *International Journal of Law, Crime and Justice*, 40
[949] Interview with National Human Rights Commission of October, 2017
[950] Frynas J George "Problems of Access to Courts in Nigeria: Results of a Survey of Legal Practitioners" (2001) 10(3) *Social and Legal Studies*, 397

armed conflict."[951] This is not to mention the enormity of investigating cases of sexual violence, especially when the perpetrators are members of the armed group such as the Boko Haram. Moreover, available data suggest that previous attempts to investigate sexual violence in peace times have been shown to be biased in favor of the female gender.[952] In other words, the police force of a patriarchal society like Nigeria does not pay attention to reports of male gender that have been sexually violated.

In many cases, victims who have been sexually violated at the IDPs claimed that they do not know what to do about it or access to legal system. There are those who claimed not to have the resources to pursue the cases to the end. This is because, in Nigeria, the cost of litigation is relatively on the high side and the Legal Aid Council which is statutorily charged with providing free legal services for the needy may be handling the matter negligently as the attorney will not apply himself to the processes since he would not be paid by the victim. In addition to this, the excessive long period that it takes for criminal cases to be resolved may also work as a deterrent to victims.[953] The insensitive attitude of the police may also deter women from reporting, and lack of victims' protection hinders effective prosecution.[954]

4.5.3 Lack of Special Tribunals and Trained Personnel for Prosecution

Unlike in many parts of the world,[955] Nigeria does not have special courts and trained personnel for the prosecution of sexual violence in situations of armed conflict. Where this is absent, it is expected that the prosecution would not only be weak but largely ineffective as there are numerous cases in a country of almost 200 million people. In countries that have

[951]Interview with N/P of January 2018

[952]Elegbeleye O.S "Is Rape in the Eye or in the Mind of the Offender? A Survey of Rape Perception among Nigerian University Stakeholders" (2006) 1(2) *Education Research and Review*, 40 at 42; See also, Richard Aborisade "The Influence of Rape Myth Acceptance and Situational factors in Defining Sex and Labeling Rape among Female University Students in Nigeria" (2016) *African Journal of Criminology and Justice Studies,*154

[953]Akintunde A Adebayo and Anthonia O Ugowe "Access to Justice through Legal Aid in Nigeria: An Exposition on Some Salient Features of the Legal Aid Act" (2019) 6(2) *Brawijaya Journal of Legal Studies*, 141

[954] M.O Izzi and Obinuchi, C "The Challenges of Rape Victims in Nigeria and the Way Forward" (2016) 8(2) *Journal of Jurisprudence and Contemporary Issues*, 22 at 25

[955]For example, the Tribunals established for crimes perpetrated in former Yugoslavia and Rwanda, including the Special Court for Sierra Leon to address grave crimes against civilians in the civil war

experienced violent conflicts such as Rwanda and Sierra Leone, special tribunals were established to try cases of abuse of power and privileges leading to indictments.[956] This is important considering the magnitude of the crime of sexual violence as has been previously treated in those countries. The fact that offences associated with sexual violence are largely treated as international crimes, the judicial officers including the judges and the prosecuting agency (the police in the case of Nigeria) are expected to have advanced knowledge in the area of international criminal law. According to scholars," They must have a good knowledge about the elements of crime if they want to secure convictions. For instance, in domestic crime of sexual violence, the lawyers duty is to prove that the charged acts of sexual offencehasoccurred and the direct perpetrator's intent to commit the crime. But where it involves crimes of international character such as sexual violence in armed conflict, the state attorney must not only prove the charged acts of sexual violence that took place, but must relate those acts to a particular context."[957]

Whoever that is prosecuting the case of sexual violence must bear in mind that he/she has the duty to convince the court to believe that such action was targeted at a group with the negative intention to destroying them, that is, "genocide in a systematic manner[958] (if charged as crime against humanity)[959] or during an armed conflict (if charged as a war crime)."[960] Whenever this happens, it is expected that diligent investigation is conducted. Unfortunately, the system has not responded for the need to train prosecutors and hire specialized judges imbued with the necessary infrastructure in place for a fairer response to sexual violence in the ongoing conflict in the North-East.

[956]Charles C Jalloh "Special Court for Sierra Leone: Achieving Justice?" (2011) 32(3) *Michigan Journal of International Law*, 396
[957]*Supra*, note 953
[958]Article 6 (b) Elements of Crimes of the International Criminal Court
[959]Article 7 (1) (g)-6 Elements of Crimes of the International Criminal Court
[960]Article 8 (2) (e) (vi)-6 Elements of Crimes of the International Criminal Court

4.6 The Complexity of Superior Criminal Responsibility for the Rape of Women during Armed Conflicts

The notion of criminal responsibility was recognized by the Appeals Chamber of the ICTY as a 'form of accomplice liability that was well established in customary international law, and under the Tribunals Statute.'[961] The clearest mode of criminal responsibility is *commission*, as specified in Article 6(1) of the ICTR Statute and Article 7(1) of the ICTY Statute. An important challenge in the prosecution of the sexual violence during armed conflict has to do with the complexity where the perpetrators may not be the one to be directly tried. While the one who committed the crime (physical perpetrator) is directly charged, the case is different under international crimes. This is because the one in charge of command and control responsibility are treated as the perpetrators for failing "to do the needful by preventing the men under his or her control and authority from committing a crime and for his or her failure to punish the perpetrators."[962] Even where the commander or any leader in the chain of command was not present when the offence was committed, it is required that the prosecutor should establish a clear link to those acts through other forms of legal responsibility such as aiding and abetting, joint criminal enterprise or command/superior responsibility.[963]It is important to note that the rule is not the same when prosecuting cases of domestic sexual violence. While it is easy to identify the chain of command of the Nigerian security forces, those of Civilian Joint Task Force (CJTF) are still unclear. However, an informed source noted that: 'The Nigerian military use the CJTF in intelligence gathering and help them in identifying some Boko Haram hideouts because they know almost every route since they are

[961]*Prosecutor v. Tadic*, (ICTY Appeals Chamber Judgment) 15 July 1999, para 185
[962]Article 28 (a) of the Rome Statute
[963]*Prosecutor v. Mpambara*, ICTR-01-65-T, 11 September 2006, Para 25 the court noted that: "Responsibility" for failure may occur where the accused is charged with a duty to prevent others from committing a crime. The culpability occurs not by taking part in the commission of a crime, but by allowing another individual to commit a crime which the defendant has a duty to prevent or punish; *Prosecutor v. Gbagbo*, Decision on the Confirmation of Charges, Case No ICC/02/11-01/11, 12 June 2014, Paras 264-5 where the court expressed that: 'the underlying difference exits between the forms of commission incriminated in Article 25 of the Statute, which establish the liability for person's own crime, and Article 28 of the statute which establishes the liability for violation of duty with regards to offence committed by others.

indigenes of that environment. But he can't categorically say whether they operate under the government or the Nigerian army.[964]

Moreover, as explained above, there are different rules involved in the prosecution of sexual violence during the period of armed conflict. Apart from having a different legal requirement, the forms of responsibility largely differ. As one observer opined, "international and domestic cases involve different kind of evidence, investigation and prosecution strategies and victims of international sexual violence must be protected."[965] However, this research suggests that considering the prevalence of sexual violence in conflict situations as seen in our study (Boko Haram conflict) against women and girls, the responsibility to prevent must require more from the superior command. It must require the superior to set up steps aimed at preventing the perpetration of sexual violence during hostile situations. Such an obligation will help in denying impunity to senior officers or leaders who may have an inclination or tendency to connive at or condone the perpetration of sexual violence by subordinates.

4.7 Denial on the Part of the Victims

Most times, victims of sexual violence do not feel comfortable to come forward and properly report cases of their abuses. This is almost a global challenge. However, the case is worse in societies where stigmatization is often the reward associated with reporting sexual violence.[966] This situation has the tendency to compound the challenge of investigation and thereafter, prosecution of those who commit the crime. EvelynJosse noted that in most cases, the challenge with victim's unwillingness to come forward to advance the course of justice can be

[964]Interview with Nigerian Army of November 2017
[965]Leiby L Michele "Wartime Sexual Violence in Guatemala and Peru" (2009) 53(2) *International Studies Quarterly*, 445
[966]Dara Kay Cohen and RagnildNordas "Sexual Violence in Armed Conflict: Introducing the SVAC dataset, 1989-2009" (2014) 51(3) *Journal of Peace Research*, 418

linked to emotional and psychological pressures associated with sexual violence.[967] This situation has been visible in Rwanda and Sierra Leone as well as in Borno State of Nigeria as captured below:

> "What we know is that of the young girls and women end up not sharing their experiences because of shame and emotional and psychological trauma. Two young girls have been raped in one IDP by the personnel of the Nigeria security forces. Yet, the non-cooperative attitude of the victims to open up remains a nightmare. They are either afraid to do so or are traumatized." [968]

The problem is further compounded by the total absence of experts in psychological counseling, especially during period of armed conflict. The plight of the victims may only be increased as the condition is not supportive. Consequently, where victims do not come forward for the reasons noted above "there would be no diligent investigation and prosecution thus, accountability mechanism will hardly succeed."[969]

Furthermore, there are other sociological factors that inhibit women, especially the Northern part of the country from coming forward to complain of the crimes of sexual violence. This has been well noted by Kelly that:"Women who survive sexual violence in times of armed conflict go through somedifficulties. Women are considered in most part of the world including Nigeria as keepers of the family's decency and honor which is embodied in the custom. A woman may suffer if she reports the crime. She may lose her status within the society or her husband may leave her if she is a married woman. In cultures where female sexuality is a taboo like Nigeria, the victims will find it difficult to speak out about their predicament with male authorities. Victims of sexual violence have come to accept their fate as a fact of life. In such circumstances, victims of sexual violence are pressured not to report same to authorities."[970]

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[967]Evelyn Josse "They came with two guns: Consequences of Sexual Violence for the Mental Health of Women in Armed Conflicts" (2010) 92(877) *International Review of the Red Cross*, 117

[968] Interview with Amnesty International of October 2017

[969]Susana SaCouto and Katherine Cleary "Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court" (2009) 17(2) *Journal of Gender, Social Policy and the Law*, 339

[970]Prof Liz Kelly "Promising Practices Addressing Sexual Violence Paper Presented at the Expert Groups Meeting, UN Division for the Advancement of Women in Collaboration with UN Offices and Crime, Vienna,

In Northern Nigeria, this beliefisingrained in the tradition of the people that see the act of sexual violence not as an assault against the human dignity of the victim, but as an "affront against the honor of the family."[971] No doubt, this can serve to inhibit the reporting of the cases of sexual violence as most of the family would want to guard against what is treated as 'humiliation.' The pioneer Special Rapporteuron violence against women once noted that: "By using the honor paradigm, linked as it is to concepts of chastity, purity and virginity, stereotypical concepts of feminists have been formally enshrined in humanitarian law … When rape is perceived as a crime against honor or morality, shame commonly ensues for the victim, who is often viewed by the community as "dirty" or "spoiled". Consequently, many women will neither report nor discuss the violence that has been perpetrated against them."[972]

4.8 Reparation for Victims of Sexual Violence

There are certain provisions of international law that required victims of rape to receive reparation. This is not to cover simply for the huge physical and psychological damage that maybe caused by rape but to assist in rehabilitating the victims. The UN Basic Principles and Guidelines on the Right to Remedy and Reparation 2006 provides in its Article 18 that "victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation."[973] As stated above, the objective of reparation is not simply to cover for the damage emanating from the act, but, as noted by de Greiff, this measure is instituted for the purpose of three basic objectives among which are, "recognition, civic trust and social

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Austria" Available at: https://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/experts/kelly.sexualviolence.pdf (Accessed May 2020)

[971]Interview with International Rescue Committee of January 2018

[972]Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, U.N. Economic and Social Council, Commission on Human Right, U.N. Doc. E/CN.4/1997/54 (Jan. 26, 1998); Available at: https://www.ohchr.org/Documents/Issues/Women/15YearReviewofVAWMandate.pdf (Accessed May 2020)

[973]UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, 21 March 2006

solidarity."[974] Above all, reparation is a social form of justice, which must recognise the harm caused by the act to the victim as well as provide some form of social empowerment, argues Bazemore and Schiff.[975]

Since the close of the last century, legal scholars have noted a significant rise in the number of those who are "demanding justice through reparations."[976] This has led to a situation where the International Court of Justice has shifted its attention more to perpetrators, crimes and legalism, with less regard given to victims and their needs.[977]It is expected that those whose rights have been violated through rape should be offered practical support including "economic and social provisions, medical facilities, psychological/trauma counselling, or indeed all of these."[978] However, Moffett has argued that the initiation of reparation to victims of rape by the ICC marked a significant innovation as it "has the potential to satisfy a number of victims' needs and deliver them a broader sense of justice than just the punishment of the perpetrators."[979]

4.9 Conclusions

This section reflects on the essential aspects of the chapter. This would enable readers to comprehend the most relevant argument(s) of the research and contribution to the existing body of knowledge. First, the chapter identified several definitional approaches, including the difficulty of proving consent by the victim(s) to the crime of sexual violence with much emphasis on rape drawn across different judicial rulings around the world. While the chapter resists the temptation to adopt a specific definitional framework to sexual violence or even

[974] Pablo De Greiff*The Handbook on Reparations* Ed (Oxford: Oxford University Press, 2006) 452
[975]Bazemore Gordon and Mara Schiff *Restorative and Community Justice: Repairing and Transforming Communities* 1st Ed (Anderson Publishing, 2001)
[976] Miller J Eric "Receiving Reparations: Multiple Strategies in the Reparations Debate" (2004) 24(1) *Boston College Third World Law Journal*, 45 at 46
[977] De Brouwer A.M, Romkens R and Ka Hon Chu S., 'Survivors *of Sexual Violence in Conflict: Challenges in Prevention and International Prosecution*,' Ed (2011) in Letschert R., Haveman R., de Brouwer A.M. and Pemberton A. *Victim logical Approaches to International Crimes: Africa* (Cambridge: Intersentia, 2011) 537
[978] Anne-Marie L.M and de Brouwer A.M., *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia, 2005) 386
[979] Moffett L., '*Justice for Victims Before the ICC'*, (Routledge, 2014) 6

rape, it provided a wide range of approaches to enable the reader appreciate the available options for the prosecution of the violators in the case of Boko Haram armed conflict in Nigeria. Second, the study identified range of reparation that can be offered to the victims of sexual violence in line with universal best practices. This is meant to minimise the effect of sexual violence on the victims. As noted in the work, the various reparation measures depend largely on the scale of sexual violence. Moreover, the effect of sexual violence on the victims differs and it is expected that the state should be able to provide a range of reparation measures to reduce the social, psychological and economic effects on the victims. This, according to the study, can help to repair the damages that have been done to the victims as well as reconcile them with the hostile cultural environment of the North-Eastern region. However, one cannot overlook the challenge associated with the definition of sexual violence during armed conflicts – this is because it is the view of this study that the objective of criminal liability may be defeated if victims (including women and girls in the Boko Haram conflict) are compelled to refrain from taking part in rape proceedings as a result of unhealthy focus on their own actions at the time of the crime. Such may occur from a definition of rape that unwittingly puts the victims on trial, by constantly focusing on whether or not they gave consent to the sexual conducts. This study rather believes that the focus should be on the hostile environment of the action of the victim could have led to consent or objection to the sexual conduct. A definition of rape that focuses on the hostile situation of the act is more likely to achieve the ends of containment of sexual violence that one that constantly requires the prosecution to prove that the victim did not give consent to the sexual conduct.

Third, it is also worthy to note that the study attempted a conceptualisation of the status of a victim of sexual violence within existing legal instruments. This is important to identify the specific group in which the study is focussed. Fourth, sexual violence appears to be one of the major instruments of war used by the Boko Haram insurgents in advancing its

course in Nigeria's North-Eastern region. Like other terrorist organisations in the Middle East, the group adopted all forms of sexual violence to achieve its goals. Fifth, from available resources that the researcher utilised, the Nigerian securities and Civilian Joint Task Force are equally culpable in committing the offence of sexual violence against their victims whom they are meant to protect. In this regard, the study noted the loopholes of the law in terms of command responsibility for crimes perpetrated by his subordinates. As it is, the law vested the responsibility to prevent and/or to punish the commission of crimes on the superiors in the command chain. Regrettably, the responsibility of a superior to prevent the perpetration of the crime, including the crime of sexual violence in armed conflict – is not engaged unless it is demonstrated that the superior had prior knowledge that the subordinate was committing or was about to commit the offence.Similarly, the chapter argues that there are limited legal instruments in Nigeria's legislation on which the court can rely to effectively punish offenders. The chapter noted that the penal code of Northern Nigeria requires serious review to accommodate new response to the crime of sexual violence, especially those committed during armed conflicts.

Sixth, the central contribution of the work relates specifically to the empirical evidence generated through interviews with victims of sexual violence and the security forces. These interviews were conducted after the researcher got approval from the relevant authorities at Coventry University. The analysed data has helped to further expose the culpability of the Nigerian security agencies that have been involved in all kinds of sexual violence in the ongoing armed conflict between the Nigerian armed forces and the insurgent group. The chapter further identified two major challenges that have inhibited effective enforcement of international humanitarian lawin the fight against Boko Haram. The first challenge that has been explained in details above has to do with the high level of indiscipline on both sides of the war. In respect to Boko Haram, it is expected that an organised insurgent

group should at least be aware of the responsibility to protect armless civilians including children, women and the aged. From the analysis above, the group has been found to be in clear violation of this responsibility and thus should be prosecuted.

Another aspect of the challenges of enforcing international humanitarian law that is analysed in this chapter relates to the poor judicial infrastructure that has further limited access to justice for victims of sexual violence in the North-East. As seen elsewhere above, the crime of sexual violence requires reliable evidence(s)to prove the allegations, and this comes with thorough investigation by the police. Unfortunately, the police who are meant to provide protection to the victims of sexual violence have instead abuse such privileges and engaged in same crime. Many reports of the involvement of security forces in sexual violence, especially rape, has been utilised in the analysis of the chapter.Also, the chapter argues that in the event domestic legal instruments are not enough to prosecute violators, the ICC can be drawn to do the prosecuting while relying on the provisions of the Rome Statutes.

In conclusion, since 2009 when Boko Haram transformed into an extremely violent group, sexual violence has been committed in a systemic fashion. While this is not entirely new, the state has offered little or no response to the crime of sexual violence. Instead, it has defended the security forces in a fashionable manner each time international bodies attempt to raise questions on the culpability of the Nigerian security forces in the fight against Boko Haram. In fact, at a point, the United States refused to sale arms to the Nigerian government on the grounds that its armed forces have been culpable in prejudicial killings and all forms of primitive practices that have been proscribed by international law,[980] not excluding sexual violence on the victims of the armed conflict.

This is unfortunate, considering the fact that victims of armed conflict, as explained in chapter 2, are regarded with special status in customary international law. They are required

[980]Julia McQuid and Patricio Asfura-Heim "Rethinking the U.S Approach to Boko Haram: The Case for a Regional Strategy" (2015) Available at: https://www.cna.org/cna_files/pdf/drm-2014-u-009462-final.pdf (Accessed June 2020)

to enjoy the protection of the state in all situations. Following from the above analysis, it is evidently clear that the Nigerian security forces are not disciplined enough to realise that the protection of victims of armed conflict is the greatest calling of their profession. However, it is also expected that when all odds are against the victims of armed conflicts, the judicial system should offer high degree of shelter through which they can seek justice. Unfortunately, as identified in the analysis above, there are no enough judicial infrastructures to rely on for the dispensation of justice. Again, the prosecution requires rigorous training in relevant aspect of International Criminal Law to undergo the task of prosecuting sexual violence. From the empirical as well as other sources, this has proven to be a serious source of challenge to the Nigerian state.

In the following chapter, we will examine, in addition to the crimes identified in this chapter – war crime and crimes against humanity of sexual violence, the political will of the Nigerian authority, under international law, to conduct genuine investigation and prosecution of all the heinous crimes committed by both sides to the conflict. In this light, we will also remind the international community of their legal responsibility in international law of sharing common interest in the development that advances human security and dignity.

Chapter Five

An Assessment of Lack of Political Will and Responsibility of States in the Effective Enforcement of International Humanitarian Law in the Boko Haram Armed Conflict in Nigeria

5.0 Introduction

The complementarity principle of the International Criminal Court states that State parties to the Rome Statute have the principal responsibility to investigate and prosecute activities that amounts to international crime recognized under the Rome State of the ICC. The Court may initiate investigations only when a state party to the Statute is unable or unwilling to investigate and prosecute alleged offenders. On that note, this chapter consists of two sections; the first section seeks to critically assess the political willingness of the Nigerian government to conduct genuine investigations into the grievous crimes committed in the fight against Boko Haram are held accountable. The second part sets out the core purpose of Common Article 1 and related obligations under international law so that third states concerned about the atrocities civilians, especially women and girls in our study are made to endure may find a common cause in challenging the inhumanity that is contemptuous of human beings and the untold suffering it imposes on millions.The objective is to demonstrate the unwillingness of Nigeria to conduct genuine investigations and to urge third states to use their influence and stand for a secured Nigeria by advising the Office of the Prosecutor of the ICC to initiate a full investigation into the alleged offences committed in the Boko Haram armed conflict.

Against the foregoing, this chapter seeks to examine the ICC-OTP's preliminary assessment in Nigeria since 2010, and critically examine willingness or inability of the Nigerian government to ensure accountability for international crimes committed in the Boko Haram armed conflict.

For the purposes of this research, the researcher has examined terms of references, as well as summaries of findings of commissions and/or panels of inquiry established by both

Nigerian political and military authorities with the mandate to investigate a range of allegations of breaches of IHL rules committed by the parties to the conflict in northeast Nigeria. In addition, I have directly and repeatedly engaged with some non-governmental organizations such as the International Rescue Committee, the ICRC country office, Amnesty International as well as military personnel and legal practitioners.

5.1 Complementarity Principle of the ICC: the Legal Context and Judicial Practice of the Court

Complementarity is a fundamental element of the Rome Statute, which establishes that States party to the Statute have the foremost responsibility to investigate and prosecute persons who commit international crimes of the Rome Statute. In the framework of the preliminary assessment process, and in compliance with Article 53(1) (b) of the Rome Statute, the OPT carries out an 'admissibility assessment' to determine whether the case would be admissible pursuant to Article 17[981] of the Rome Statute, and if there is any 'complementary' appropriate domestic level proceedings that have been or are being carried out. The provision of Article 17 of the Rome Statute states that a case will be admissible before the ICC where a State proves unable to investigate and prosecute perpetrators of crimes of the Rome Statute.[982] Similarly, Article 17(1) (a) considers when state governments are currently examining the same case as the ICC; and Article 17(1) (b) considers situations where the state government has investigated the same case but choose not to prosecute.[983]

Therefore, the Office of the Prosecutor's (OTP) complementarity review at the preliminary examination stage first analyses the factual point, that is, whether there are or

[981]International Criminal Court, Decision under Article 15 of the Rome Statute on the Authorization of an Investment into the Situation in the Republic of Kenya (hereinafter Kenya Article 15 Decision), Para 40

[982]*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No ICC-01/04-01/07-1497 OA 8, (Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, Where the Court noted that if a State that has a Jurisdiction is not investigating or prosecuting or has declined to investigate or prosecute, is regarded as "inaction" at para 2

[983] Paul Seils, International Coalition of Transitional Justice (ICTJ), Handbook on Complementarity, 38

have been any significant domestic investigations or prosecutions.[984] This is because; there would be no legal ground for the Court to consider the case inadmissible before it where the suspect or the crime has not been investigated by the domestic authorities.[985] Simply put, 'domestic inaction,' the failure of domestic trials, is enough reason to render a case admissible before the ICC, without even taking into account some of the other elements set out in Article 17 of the Rome Statute; including the questions of unwillingness or inability of the concerned country.[986] The OTP's preliminary assessment procedure expounds that inaction could be attributed to several factors, including 'the lack of sufficient legal framework; the existence of laws that serve as a shield for effective national proceedings, such as immunities or statutes of limitation, amnesty; deliberate concentration of the proceedings on low-level or slight number of perpetrators notwithstanding evidence on those more responsible; or other, more general issues related to the lack of political will or institutional incapacity, such as the judiciary.[987]

During the preliminary assessment, there is still not a 'case,' as understood to include an established set of situations, suspects and actions.[988] Therefore, 'the contours of the possible cases will often be rather vague because the investigations of the Prosecutor (at the preliminary assessment phase) are at their early phases.[989] Admissibility is thus examined base on certain criteria defining a 'potential case' including

[984]*Supra,* note 982 at*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* para 78
[985]*Prosecutor v. Francis Kirmi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No ICC-01/09-02/11-274, ICC Appeals Chamber, Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case under Article 19(2) (b) of the Statute" 30 August 2011, para 43
[986]International Criminal Court, Office of the Prosecutor, Policy Paper on Preliminary Examinations (hereinafter OTP PE Policy), para 47
[987]*Ibid,* at 48
[988]The concept of a case has been defined by the Pre-Trial Chamber I (PTCI) in the Lubanga case as including "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been perpetrated by one or more identified suspects," and that the admissibility examination comprises of an evaluation of "both the person and the conduct which is subject of the case before the court; *Prosecutor v. Thomas Lubanga*, Case No ICC-01/04-01/06, Decision on the Prosecutor's Application for Warrant of Arrest, Article 58 (10 February 2006), paras 21, 31, 38, included in the record by Decision ICC-01/04-01/06-8-Corr
[989]Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case under Article 19(2) (b) of the Statute" 30 August 2011, para 38

- The group of persons involved that are potentially the focus of an investigation for the purpose of shaping future case(s);
- The crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).[990]

Therefore, domestic stage investigations must 'encompass the same persons and substantially the same actions as alleged in the proceedings before the Court.[991] In addition, in line with the jurisprudence of the ICC, as well as the OTP's guidelines on preliminary assessment, relevant national proceedings will be evaluated on the degree to which they focus on those bearing the greatest liability for the most grievous crimes.[992]

The final essential component of an admissibility analysis has to do with an examination of whether domestic proceedings are corrupted by an unwillingness or inability to genuinely conduct the proceedings, and whether proceedings were carried out with the intention to bring the person(s) to justice.[993] The Court has equally noted that preliminary assessments must be concluded '*within a reasonable time*... irrespective of their intricacy.[994] The hypothesis of Article 53(1) of the Rome Statute... and that of a reasonable mind is that the Prosecutor investigates so as to enable the office to appropriately examine the relevant facts.[995] This means that, the extension of a preliminary assessment beyond such time is, in

[990]OTP PE Policy, paras 43-4
[991]*Prosecutor v. SamoeiRuto, Henry Kiprono and Joshua Arap Sang*, ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 20 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2) (b) of the Statute, 30 August 2011, para 1, 47
[992]International Criminal Court, ICC-01/17-X-9-US-Exp, 25 October 2017, Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, (hereafter Burundi Article 15 Decision), 9 November, Para 144; OTP PE policy para 45
[993]OTP PE Policy, Article 17(2), paras 50-59
[994]International Criminal Court, ICC-01/05-6, Pre-Trial Chamber III (*Situation in the Central African Republic Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic*), 30 November 2006, p 4 [Emphasis added]
[995] International Criminal Court, ICC-01/13-34, *Pre-Trial Chamber I, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation* (Hereafter the Comoros Article 53 Decision), 16 July 2015, para 13

principle unnecessary.[996] The 'reasonable ground' of valuation method of a preliminary assessment does not require any compound or an in-depth process of review, and the information presented need not be 'all-inclusive or conclusive,' especially bearing in mind the limited investigative powers at the prosecutor's disposal, relative to those provided for in Article 54 of the Rome Statute at the investigation phase.[997] Therefore, by and large, an investigation should be launched without delay and be carried out in an efficient manner so that it can be effective.[998]

The OTP has equally noted that it will not only examine if a relevant domestic proceedings occurs or not, but also seek to encourage, to the extent possible, a genuine domestic investigations and prosecutions by the state(s) concerned with regards to crimes listed in the preliminary assessment (positive complementarity).[999] Immediately after the preliminary assessment is completed, and the situation is not referred to the Court by a State party, the OTP must request authorization to open a *propriomotu* investigation under Article 15 of the Rome Statute. The Pre-Trial Chamber of the ICC will carry out a judicial examination to determine whether the situation that the State is investigating adequately reflects the situation which the OTP is investigating.[1000] To conduct this assessment, the primary situations under investigation - both by the Prosecutor and the State, together with the acts or actions of the suspect(s) that leads to his/her criminal responsibility for the act mentioned in those situations must be compared.[1001] Where it has only been determined that discrete aspects of the case before the Court are being investigated nationally, it will very likely not be possible for a Chamber to decide that the same case is under investigation.[1002]

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[996] Pre-Trial Chamber I, ICC-RoC46(3)-01/18, Request under Regulation 46(3) of the Regulations of the Court, (Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute), 6 September 2018, para 84
[997] *Ibid*, paras 84-6
[998] *Ibid*
[999] OTP PE Policy, para 101
[1000] Burundi Article 15 Authorization Decision, Para 147
[1001] *ibid*
[1002] *ibid*

5.1.2 Investigations at the Domestic Level: Analysis of the ICC Pre-Trial Chamber

In 2017, the ICC Pre-Trial Chamber examined a domestic level 'commissions' or 'inquiries' set up to investigate allegations of international crimes perpetrated in a – at the time - ICC states party. In its ruling regarding the OTP''s Article 15 call to authorize the opening of an investigation in Burundi, the Chamber expressed that if documentation 'provided to the Chamber discloses that these commissions and proceedings do not cover exact (groups of) people that are likely to be the focus of an investigation into the circumstances (in a States Party) or that the Commissions have not conducted concrete, and advanced investigative steps... there is no conflict of jurisdiction between (the State Party) and the Court.[1003]

5.2 Trials at the State-Level

As explained above, the Office of the Prosecutor's complementarity examination at the preliminary assessment phase will first consider the question of whether there are or have been any germane domestic inquiries or prosecutions.[1004] In essence, concerning the ICC's admissibility examination, state-level proceedings of inquiries and prosecutions must relate to acts or activities that violates the Rome Statute and within the jurisdiction of the Court during the incidents as defined by the Court. Consequently, where the suspect or an act has not been investigated at the State-level, there is no legal ground for the OTP not to proceed to investigations stage or the Court to find the case inadmissible.[1005]

In the following sections, I will present my research findings on the major, potentially relevant state-level trials completed or ongoing in Nigeria covering the period of OTP's preliminary assessment in Nigeria.

[1003]*Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12-47-Red Decision on Cote d'Ivoire's challenge to the admissibility of the Case against Simone Gbagbo, 11 December 2014, Para 65; *Prosecutor v. Simone Gbagbo*, Appeals Chamber, ICC-02/11-01/12-75-Red, (Judgment on the appeal of Cote d'Ivoire against the decision of the Pre-trial Chamber I of 11 December 2014) 27 May 2015, Para 122
[1004]*Supra*, note 982 at *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* Para 78
[1005]*Supra*, note 985 at *Prosecutor v. Francis Kirmi Muthaura*, para 43

5.2.1 The Case of Baba Fugu

In 2009, Baba Kuru Fugu, the son of late Baba Fugu Mohammed – 72-year old father-in-law of the founder of Boko Haram – Mohammed Yusuf, who was unlawfully executed by the Nigerian security forces in July 2009 – filed a suit against the Nigerian government for the arbitrary execution of his father before the Borno State High Court, sitting at Maiduguri.[1006] In April 2010, the Court ruled that the killing of Baba Fugu, was "illegal, unconstitutional and a breach of his right to life." In its judgment, the judge held that:

> "The killing of the applicant's father did not only violate the Constitution of the Federal Republic of Nigeria, the African Charter and the Universal Declaration of Human Rights, but also the sensibilities of decent and right thinking Nigerians. It is against everything that is decent. I do not think even the Spanish inquisitors could have done worse."[1007]

The Court ordered the Nigerian government to compensate the family with 100 million naira for the damage caused, exhume his body for proper burial, and express regret for their "reprehensive and unconstitutional acts."[1008] Even though the Federal Government did not contest the facts of the case during trials, it however appealed the ruling four days after the judgment. In September 2011, with the appeal still pending, unidentified gunmen shot and killed Baba Kuru Fugu, the son of Baba Fugu who sued the Nigerian government. Soon after, the Nigerian government withdrew its appeal and compensated the family 100 million naira. The then governor of Borno State, KashimShettima sympathies to the Fugu family, noting that, 'no amount of money will compensate for the loss of human life.[1009] However, the deceased's body is not exhumed, which is believed to have been buried in a mass grave in Maiduguri.[1010]

[1006] Why Boko Haram Members are Bitter – Fugu Family Lawyer, available at: https://www.thenigerianvoice.com/news/70633/why-boko-haram-members-are-bitter-fugu-familys-lawyer.html (Accessed September 2020)

[1007] High Court of Borno State: *Babakura Fugu Alhaji v. The President Federal Republic of Nigeria & 4 Ors*, Suit No BOHC/MG/CV/012/10, Judgment, April 13, 2010, p 13

[1008] *Ibid*

[1009] Hamza Idris, "Nigeria: KashimShettima Pays 100 Million Compensation to Boko Haram Leader's In-laws; available at: https://allafrica.com/stories/201201100435.html (Accessed September 2020)

[1010] Why Boko Haram Members are Bitter – Fugu Family Lawyer, available at: https://www.thenigerianvoice.com/news/70633/why-boko-haram-members-are-bitter-fugu-familys-lawyer.html (Accessed September 2020)

However, the alleged final words of Babakura, the son of Baba Fugu have raised concerns and so many unanswered questions. This is because, on 15th September, two days before he was killed, Babakura met with former President of Nigeria Chief Olusegun Obasanjo to discuss the controversial death of Mohammed Yusuf.[1011] When asked by Sahara Reporters if he has any video or pictures of the meeting, Babakura said "the former president came with his personal camera men and didn't get any pictures."[1012] He was further asked if he had any prior relationship or connection with Obasanjo, Babakura said, "No, I have never met him before now."[1013] But Sahara Reporters claimed that Babakura was killed before appearing on the channel - Sahara TV, where he was expected to disclose details of his meeting with former president Olusegun Obasanjo. However, the Fugu family lawyer, Barrister Anayo, dismissed all rumours surrounding Obasanjo's visit, stating that 'his visit to the family is a welcome development."[1014] Therefore, based on the findings and analysis presented above, this research considers that, as at the time of writing this research, this is the only genuine case that got fair hearing and victim's family were compensated.

5.2.2 Trials Concerning Boko Haram Members

In 2014, the OTP reported that the Nigerian government has been 'carrying-out proceedings' against members of Boko Haram group for activities which amounts to international crime

[1011] The late founder of Boko Haram killed in July, 2009

[1012] Sahara Reports, "The Curious Death of BabakuraAlhaji Fugu – With Exclusive Audio of his Last words," available at: http://saharareporters.com/2011/09/18/curious-death-babakura-alhaji-fugu-saharareporters-exclusive-audio-his-last-interview (Accessed September 2020)

[1013] Sahara Reporters, "Final Words before his death: Babakura Fugu Speaks to Sahara Reporters about meeting Obasanjo," available at: http://saharareporters.com/2011/09/17/final-words-his-death-babakura-alhaji-fugu-speaks-sahara-reporters-about-meeting-obasanjo (Accessed September 2020)

[1014] Why Boko Haram Members are Bitter – Fugu Family Lawyer, available at: https://www.thenigerianvoice.com/news/70633/why-boko-haram-members-are-bitter-fugu-familys-lawyer.html (Accessed September 2020) Barrister Anayo stated that:For the very first time, let me commend the personal initiative of General Obasanjo. His visit to the family is a welcome development. This is something we have been craving for since 2009. If only the government had done this in 2009, we would not have found ourselves in this mess today. However, it is never too late to right the wrong. So, his visit is good for all of us. This will go a long way in pacifying the family and all those who are aggrieved. They now know that all hopes are not lost; there is still hope for justice at the end of the day. The government can still be responsible enough to accept certain wrongs and do the necessary in the present situation.

under the Rome Statute.[1015] In 2015, the OTP clearly noted that it has obtained information on about 150 cases with respect to Boko Haram members at various stages which has been forwarded to the Attorney-General of the Federation for authorization.[1016] In 2017, the OTP reported that only a "limited number"[1017] of case files seem to relate to the alleged atrocities committed by Boko Haram members against civilians.[1018] However, it is not clear whether the cases referred to by the OTP in its report concerning the alleged crimes conducted by Boko Haram members relates to conduct(s) within the jurisdiction of the ICC, or which cover the same persons and considerably the same actions as alleged in the proceedings before the Court.[1019]

However, the findings of this research indicate that before October 2017, just a few cases were actually presented before the Federal High Court across the country - concerning the alleged crimes committed by the Boko Haram armed group. In response to the request for information, the Ministry of Justice noted that as of October 2017, a total of 12 Boko Haram suspects were convicted in 'terrorism related cases.'[1020]

Among these cases, two of them relate to high-ranking members of the Boko Haram armed group. First is the case of KabiruSokoto, the man who carried-out the 'Christmas Day bombing' in Madala, Niger state, Nigeria.[1021] In December 2013, he was found guilty on terrorism charges and sentenced to life imprisonment by the Federal High Court sitting at

[1015] International Criminal Court, Office of the Prosecutor, Report on the Preliminary Examination Activities, 2014, para 182
[1016]ICC, OTP Report on the Preliminary Examination Activities, 2015, para 216
[1017]Emphasis added
[1018] ICC, OTP Report on the Preliminary Examination Activities, 2017, para 216
[1019]*Prosecutor v. Saif Al Islam Gaddafi and Abdullah Senussi*, ICC-01/11-01/11-466-Red, (Decision on the Admissibility of the Case against Abdullah Al-Senussi), 11 October 2013, Para 66: …"for the Chamber to be satisfied that the domestic investigation covers the same case' as that before the Court, it must be demonstrated that: a) the person subject to the domestic trials is the same person against whom trials before the Court are being conducted; and b) the conduct that is subject to the national investigation is substantially the same conduct that is alleged in the proceedings before the Court … The determination of what is substantially the same conduct as alleged in the trials before the Court' will vary according to the concrete facts and circumstances of the case, and therefore, requires a case by case analysis"
[1020]Interview with Ministry of Justice, Abuja October 2017
[1021]Nigeria: Boko Haram Bombed Suspect Escapes from Police, Available at:https://www.bbc.co.uk/news/world-africa-16607176 (Accessed July 2020)

Abuja.[1022] According to reports, there were deep concerns regarding the fairness of the trials, with the accused asserting accusations of torture and refusal of access to his legal counsels.[1023] The second case relates to Usman Umar Abubakar popularly known as Khalid Al-Barnawi, the alleged ex leader of the Ansarufaction of the Boko Haram. In early 2017, he was arraigned before the Federal High Court sitting in Abuja on charges of kidnapping and killing of ten foreign nationals.[1024] However, it is still obscure whether the suspect has been convicted as well as the present stage of the trial. Even though, as at the time of writing this thesis, these two cases may possibly be the only indictments of top Boko Haram members in Nigeria, and inadequate information and lack of access to court documents renders it more difficult to examine how relevant and genuine the trials are. In spite of persistent request, the researcher was not able to gather information on what crimes these suspects were indicted for, and especially, no court documents with respect to the two mentioned cases was provided – claiming they are classified.[1025]

5.2.3 Mass Trials

The Nigerian government started mass proceedings of Boko Haram suspects in October 2017, in what appears to be an attempt to tackle the large backlog of persons in military custody pending trial. At the beginning of the mass proceedings, the office of the Attorney-General of the Federation stated that 1670 individuals were held in Kainji, pending the hearing of their cases by the Court.[1026]

[1022] Man charged over Nigeria Christmas Day bombing; Available at: https://www.voanews.com/africa/man-charged-over-nigeria-christmas-church-bombing (Accessed July 2020)
[1023]Boko Haram Kingpin KabiruSokoto Sues Federal Government for N300; Available at:https://enewsnigeria.com/boko-haram-kingpin-kabiru-sokoto-sues-federal-government-for-n300million/ (Accessed July 2020)
[1024]Nigerian Government arraigns Boko Haram suspects for 2011 murder of foreigners; Available at: https://www.premiumtimesng.com/news/headlines/226083-nigerian-govt-arraigns-boko-haram-suspects-2011-murder-foreigners.html (Accessed July 2020)
[1025]Interview with Ministry of Justice, Abuja, October 2017
[1026]Trial for 1,670 Suspected of Boko Haram links to start in Nigeria; available at:https://www.cbc.ca/news/world/boko-haram-trial-starts-1.4346586 (Accessed July 2020)

In general, three (3) court hearings were held; in October 2017, February and July 2018 before the Federal High Court sitting in Wawa military cantonment in Kainji, Niger state, each lasting for two (2) to four (4) hours only. The suspects that were brought before the "Kainji mass trials" were amongst the thousands that were arbitrarily arrested by the military. They were not given the reason(s) for their arrest or incarceration. They were moved to military prisons without charges and after several months or usually years of incarceration, most detainees are still not aware of the charges brought against them. For instance, out of the 144 Boko Haram suspects tried in 2018, 19 were charged with terrorist activities, 1 for hostage taking, 124 charged as Boko Haram members, 68 hiding of relevant information, 76 for assisting the armed group, 49 for and/or participation in Boko Haram meetings. Out of these suspects,107 were indicted - 7 were indicted for terrorist acts, one for hostage taking, and the remaining 99 for Boko Haram membership or assistance, taking part in trainings or meetings, hiding of tangible information from the security authorities, or a fusion of these charges.[1027] The 'mass trial' hearings were also characterized by many serious fair trial violations,[1028] including lack of legal representation,[1029] lack of court interpreters because most of the suspects, if not all, don't understand English, which violates their right to fair hearing.[1030] The hearings were conducted in Wawa barracks, and while speaking on the environment, Justice Nyako, a judge of the Federal High Court that was assigned to hear these cases, noted that 'the settings - civilian courts in a military base - was not ideal, which also violates their fundamental rights of fair hearing.[1031]

[1027] *ibid*
[1028] Nigeria: Flawed Trials of Boko Haram Suspects; available at:https://www.hrw.org/news/2018/09/17/nigeria-flawed-trials-boko-haram-suspects (Accessed July 2020)
[1029] *Ibid*; see also Article 14(3) ICCPR, 1966
[1030] See Section 36(1) of the Nigerian Constitution, 1999; Article 14(3) ICCPR, 1966
[1031] Agence France-Presse "Nigeria begins Mass-Trials of Hundreds of Boko Haram Islamic Suspects;" available at: https://www.scmp.com/news/world/africa/article/2114633/nigeria-begins-mass-trials-hundreds-boko-haram-islamist-suspects (Accessed July 2020); Article 14(3) International Covenant on Civil and Political Rights, 1966

5.3 Judicial Proceedings Concerning alleged Crimes Committed by the Nigerian Army

In 2017, the OTP recognized 2 national- level commission of inquiries set up by the government: The 'Special Board of Inquiry' (SBI), established by the Nigerian army, and the 'Presidential Investigation Panel to Review Compliance of the Armed Forces with Human Rights Obligations and Rules of Engagement' (PIP), established by the Presidency - which it stated could potentially form a prima facie, relevant hearings regarding its admissibility assessment of possible cases as regards alleged crimes conducted by the Nigerian military. The two investigative bodies noted by the OTP in its 2017 report should be noted against Nigeria's record of establishing panels of inquiry that do not produce credible investigations and prosecutions. These two panels are examined below:

5.3.1 The Special Board of Inquiry

After series of petitions in relation to gross human rights abuses and reports of crimes committed by officers of the Nigerian army by civil organizations and human rights groups, and in the midst of manifest pressure from the US and UK government to probe these claims,[1032] the Chief of Army Staff (COAS) Lt. Gen. Tukur Y Buratai instituted a nine-member Special Board of Inquiry (SBI) in March 2017 to assess these series of allegations. The board members include four serving and three retired senior military officers and two lawyers.[1033]

The board was established under section 172 of the Armed Forces Act, 2006. It was assigned to 'express its opinion' and was vested with investigatory powers only. Besides, section 172 clearly stipulates that no evidence obtained or received by the board would be admissible in court martial proceedings except a witness had given false evidence.[1034]Further,

[1032]US and UK Revoke visas for Nigerian Officers connected to Human Rights Abuses; available at: https://www.cfr.org/blog/us-and-uk-revoke-visas-nigerian-officers-connected-human-rights-abuses (Accessed July 2020)
[1033]Office of the Prosecutor, ICC; available at:https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Nigeria_ENG.pdf (Accessed June 2019)
[1034]The Armed Forces Act, 2006

the terms of reference of the board does not contain a clear mandate to identify and recommend persons for scrutiny or prosecution, instead the board was mandated with "determining the genuineness of the reports by civil societies with regards to the claims against some high ranking retired military officers.[1035] Therefore, this is an indication that the board was not a body established to bring about criminal prosecutions and does not conform to Nigeria's responsibility to investigate and prosecute persons alleged to have committed international crimes and abuses of human rights.

In 2017, the board presented its findings to the COAS, but as at the time of writing this research, the full report was not made available to the public. The researcher obtained a summary of the report from Amnesty International (claimed to have received it through the Minister of Foreign Affairs), however, the summary was actually the same as the one released to the public in a media briefing in June 2017.[1036] Therefore, it is not possible to independently analyse the findings, methodology and credibility of the information collected and reviewed in the board's report.

The board generally concluded in its summary report that there was no credible evidence of human rights violations as claimed against the Nigerian armed forces in their military activities in the north-east and thus, denied all allegations of serious violations of

[1035]Office of the Prosecutor, ICC; available at:https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Nigeria_ENG.pdf (Accessed June 2019) Para 219 : The mandate include: a) Evaluate the general situations of detainees and their handlers in military detention facilities across the country, b) Examine the reasons that are adduced by human rights groups for alleged cases of deaths in military detention facilities across Nigeria, c) Investigate any allegations of summary executions in Giwa Barracks on 14 March 2014 or in any other National Army barracks on any day, d) Investigate all known allegations of torture, forced disappearance, unlawful killing and illegal detention in relation to Nigerian army operations, e) Determine the veracity of the report by human right groups in relation to the allegations against some retired senior officers, f) Evaluate the conditions of the IDPs camps across Nigeria, g) Examine the reasons that are adduced by human rights groups for alleged cases of deaths that have taken place in IDP camps across Nigeria; h) Investigate the role played by the Nigerian Army during the rally by Indigenous People of Biafra in Onisha on 30 May 2016 and Aba on 9 February 2016; i) Investigate and elucidate any other situation or information relating to the matters as the Board may deem relevant.

[1036]Nigerian Army, Department of Civil Military Affairs, Text Media Briefing by Major General NE Angbazo on Report of Special Board of Inquiry to Investigate alleged Human Rights abuses against Nigerian Army personnel in the fight against Insurgency at the North East and Internal Security Operations at the South East: https://globalsentinelng.com/2017/06/16/full-text-media-briefing-maj-gen-ne-angbazo-report-special-board-inquiry-investigate-alleged-human-rights-violations/ (Accessed March 2020)

human rights, including sexual violence, extra-judicial executions, torture and enforced prostitution.[1037] In addition, the outcome of the board's report sought to reduce the weight of human rights violations by the security forces. For instance, the report stated that detention centres were not maintaining adequate records and did not rightly register that 'most of the detained persons were at the time of arrest malnourished and in weak physical condition' which could be misconceived as proof of premeditated starvation.[1038] The board dwell on denying all claims of potentially individual and command responsibility tabled on now former, high ranking soldiers including Maj. Gen. John Ewansiha, Maj. Gen. OT Ethan, and Maj. Gen. Ahmed Mohammed, Maj. Gen AO Edokpayi, and Brigadier Gen. RO Bamigboye, dismissing documentary and other evidence publicly available by claiming lack of forensic evidence to verify allegations.[1039]

As far as this study could verify, the outcome of the Special Board of Inquiry have not been forwarded to any competent investigative agency in Nigeria to assess and, if required carry out further investigations and/or criminal prosecutions. Rather, the COAS assessed the board's report and concluded that the report contained "incredible findings" and those allegations by civil societies and human rights organizations are spurious. Instead, the COAS seems to have accepted four recommendations only, and none is connected to any steps towards criminal investigations of officers of the Nigerian Army.[1040]

5.3.2 The Presidential Investigation Panel

The presidency established the Presidential Investigative Panel to Review Compliance of the Armed Forces with Human Rights Obligations and Rules of Engagement, in August of

[1037] *ibid*
[1038] *ibid*
[1039] *ibid*
[1040] *Ibid* a) The DA should take reports and recommendations of the SBI with a view to clearing the issue with stakeholders at his end; b) The ministry of Justice should facilitate the setting up of a special prosecution team to profile and prosecute the detainees; c) The ministry of justice should discountenance the spurious allegations of human rights abuses; d) The ONSA should ensure that there is synergy among the stakeholders in the counterinsurgency operations for effectiveness

2017.[1041] The panel was made up of seven members: a Justice of the Court of Appeal as the chair of the panel, a Maj. General from the Nigerian Army, a delegate from the Office of the National Security Adviser, and a legal practitioner who was also on the board of SBI (Special Board of Inquiry) that broadly exonerated the Nigerian Army from all allegations of abuse.[1042]

The panel was vested with the responsibility to investigate the Nigerian armed forces compliance with international humanitarian law obligations in the Boko Haram conflict, and of "matters of conduct and discipline" of the military forces.[1043] The panel was also obliged to make recommendations on "methods of avoiding" the violations of IHL rules during hostilities, as well as additional recommendation(s) the panel find it essential.[1044] However, their terms of reference were clearly silent on whether the panel is required to proffer recommendations for the investigation and prosecution of persons alleged to have committed grave crimes or to set up criminal proceedings by itself. Likewise, the legal ground on which the panel was set up was never clarified.[1045] In addition, the geographical scope of the panel's authority or jurisdiction was not defined and thus there was lack of accuracy on how backward in time the panel was authorized to go in its investigation into reported allegations and matters of conduct and discipline in the armed forces, and whether the panel's authority or jurisdiction covers investigation of criminal activities perpetrated throughout the country.[1046] It also seems that the panel was not equipped with all necessary technical and manpower resource capacity to carry out such a broad and complex investigative assignment

[1041]Idris Ibrahim "Osinbanjo sets up Judicial Commission to probe Human Rights abuses by the Military;" available at:https://www.premiumtimesng.com/news/headlines/239297-just-osinbajo-sets-judicial-commission-probe-human-rights-abuses-nigerian-military.html (Accessed April 2019)
[1042]*ibid*
[1043]*ibid*
[1044]*ibid*
[1045]Amnesty International; available at:https://www.amnesty.org/en/latest/news/2018/09/nigeria-release-presidential-panel-report-to-ensure-transparency-and-accountability/ (Accessed April 2019)
[1046]Nigeria: Failure to Release Report of Presidential Panel a Setback for Rule of Law, available at: https://mainnews.net/africa/nigeria-failure-to-release-report-of-presidential-panel-a-setback-for-rule-of-law/ (Accessed September 2020)

aside a secretary and a counsel. Considering the nature of allegations the panel was assigned to investigate, it is necessary for the panel to be well-established with competent and independent professional personnel with skills in criminal investigation, human rights investigation, forensic analysis, legal analysis, data management, and witness protection advice, interpretation as well as gender advice.[1047]

Instead, the panel pursued a quasi-judicial method in its investigation, which basically means that all the people who made submissions to the panel pursuant to its public call for memorandum, including experts, witnesses, victims and civic societies, were considered as petitioners/complainants, while the alleged offenders, the army more broadly and its varied fields, were addressed as the respondents.[1048] Although the activities of the panel were reported to be conducted in public, the panel's procedural regulation stated that "the panel may hold private hearings where 'this is necessary in the interest of National Security and public safety.'[1049] In addition, the regulation noted that press and media coverage would not granted access to the panel's proceedings.[1050] In practice, this has led most hearings where major allegations against the army were made to be arbitrarily conducted in closed sessions.[1051] The panel submitted its final report to the presidency in February 2018.[1052] However, as at the time of writing this research, this report was not made available to the public and as such, it would be unreasonable and practically impossible to independently examine the findings, methodology and validity of information obtained and reviewed in the

[1047] *ibid*
[1048] Rules of Procedure for the Presidential Investigation Panel to Review Compliance of the Armed Forces with Human Rights Obligations and Rules of Engagement, 11 September 2017; hereafter PIP Rules of Procedure
[1049] Section 1(4) PIP Rules of Procedure
[1050] Section 2(3) PIP Rules of Procedure
[1051] Amnesty International "Ensure Independence and Effectiveness of the Presidential Investigation Panel available at: https://www.amnesty.org/en/documents/afr44/7075/2017/en/ (Accessed April 2019)
[1052] VON, Presidential Investigation Panel Recommends overhaul of Human Rights Commission; available at:https://www.von.gov.ng/presidential-investigation-panel-recommends-overhaul-rights-commission/ (Accessed April 2019)

report.[1053] However, the refusal to release the findings of the panel is a clear indication that the government is genuinely not willing to investigate and prosecute persons who committed international crimes in the conflict.

5.4 Assessment of Potential Admissibility of Boko Haram Case before the ICC

In line with international law, Nigeria has the responsibility to investigate and prosecute all crimes allegedly perpetrated by all parties to the Boko Haram armed conflict in north east Nigeria; including the Nigerian armed forces and members of the Boko Haram armed group. Also, as a state party to the Rome Statute of the ICC, Nigeria has clear international obligation to genuinely discharge its responsibility of the Statute. Its principal - "complementarity"- responsibility (with the ICC as a "last resort") is to investigate and, prosecute persons alleged to have committed Rome Statute crimes (including war crimes and crimes against humanity) committed on Nigerian territory or by Nigerian nationals, and to co-operate with the International Criminal Court.

A general review of the ten (10) years of the OTP's preliminary assessment period in Nigeria sets the impression of some activities happening related to cases under review by the OTP. Such a situation, where there is an indication of related domestic proceedings taking place, no matter the slightest such could, potentially pose some difficulties to the OTP in its admissibility examination, and thereby making it more difficult for the OTP to quickly go ahead and make an Article 15 *propriomotu* request to open an investigation.[1054] With that said, as set out in the following parts of this study, the research's assessment of the conflict situation in north east Nigeria reveals that there is indisputably inadequate national-level

[1053]Nigeria: Failure to Release Report of Presidential Panel a Setback for Rule of Law, available at: https://mainnews.net/africa/nigeria-failure-to-release-report-of-presidential-panel-a-setback-for-rule-of-law/ (Accessed September 2020)

[1054]As Human Rights Watched explained in its review on lengthy preliminary assessments, the OTP could be left in limbo: the OTP could find itself with too much national activity to be certain ICC judges will find OTP action permissible, but too little domestic activity to close out the preliminary assessment in deference to genuine domestic proceedings. See The Pressure point: ICC's Impact on National Justice, Lessons from Colombia, Guinea, and the United Kingdom; available at:https://www.hrw.org/report/2018/05/03/pressure-point-iccs-impact-national-justice/lessons-colombia-georgia-guinea-and (Accessed April 2019)

action to fulfil the inadmissibility conditions of the Rome Statute, especially with regards to the two identified crimes in chapter 4 (War Crime and Crime against humanity), allegedly perpetrated by the Nigerian armed forces. Therefore, this research holds that notwithstanding the indication of *prima-facie* national-level proceedings carried-out or being carried out in Nigeria, the OTP should present that the case of Nigeria is admissible before the Court, and in accordance with Article 15 of the Rome Statute, make a *propriomotu* application for authorization to the Court to open an investigation. This is because the ten-year delay in conducting relevant national-level trials in Nigeria - especially into crimes perpetrated by the Nigerian armed forces and the CJTF- has not been justified with objective reasons.

Basically, as explained above, to investigate and prosecute crimes of the Rome Statute, the Nigerian government essentially has to demonstrate both the capacity and the political will to do so-Nigeria must be willing to be able. Data obtained suggests that the obvious domestic inaction in Nigeria largely demonstrates the governments' lack of willingness to genuinely hold perpetrators accountable for their alleged wrongful acts. In this light, the Pre-Trial Chamber of the ICC stated that preliminary assessments must be concluded 'within a reasonable time... irrespective of their complexity.[1055] The suggestion of Article 53(1) of the Rome Statute and of logical reasoning is that the OTP investigates in order to be able to thoroughly evaluate the relevant facts.[1056] It noted that a protraction of a preliminary assessment beyond that point is, in principle, unnecessary.[1057]

The 'reasonable basis' phase is the minimum evidentiary standard set out in the Statute. In view of this, the ICC has provided that 'the preliminary assessment per se 'does

[1055]ICC-01/05-6, Pre-Trial Chamber III, *Situation in the Central African Republic*, (Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic), 30 November 2006, p 4

[1056] International Criminal Court, ICC-01/13-34, *Pre-Trial Chamber I, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation* (Hereafter the Comoros Article 53 Decision), 16 July 2015, Para 13

[1057] Pre-Trial Chamber I, ICC-RoC46(3)-01/18, Request under Regulation 46(3) of the Regulations of the Court, (Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute), 6 September 2018, Para 84

not necessitate any complex or exhaustive process of evaluation,' and the data available is not expected to be 'comprehensive' or 'conclusive,' especially given the limited investigative powers at the OTP's disposal, in comparison with those provided for in Article 54 of the Rome Statute at the investigative phase.[1058] Therefore, 'an investigation should in general be initiated without delay and be carried out efficiently in order for it to be effective.[1059] This study considers that any further unnecessary delay in initiating a full investigation in Nigeria should be examined against its possible violation of victim's universally recognised rights as stipulated in Article 21(3) of the Rome Statute.[1060]

In the following sections, this study presents what the research considers as some of the crucial related factors, examined as a whole, would lead to a reasonable conclusion that Nigeria has failed in its obligations under IHL to protect her citizens from the dangers of armed conflict, and is not showing genuine willingness to investigate and prosecute crimes under international law perpetrated in her territory, and as such, this research presents the motion that the OTP tables the case for admissibility before the Court and request for opening an investigation into the Boko Haram situation in Nigeria.

5.4.1 Admissibility due to Lack of National Level Proceedings

As noted earlier,[1061] the first issue in a complementarity examination is whether there are or have been any proper domestic investigations or prosecutions as explicitly provided in Article

[1058]ICC-RoC46(3)-01/18, Pre-Trial Chamber I, Request under Regulation 46(3) of the Regulations of the Court, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," 6 September 2018, para 84

[1059]*Ibid*, paras 84-6

[1060]*Ibid*, "...The Pre-Trial Chamber points out that the Prosecutor mandated to respect the internationally recognised human rights of victims with respect to the conduct and result of her preliminary assessment, especially the rights of victim to know the truth, to have access to justice and to request reparations, as already established in the jurisprudence of this Court [...] Within the Court's legal framework, the [sic] victims' rights both to participate in the trials and to claim reparations are entirely dependent on the Prosecutor starting an investigation or requesting authorization to do so. The process of reparations is intrinsically connected to criminal trials, as established in Article 75 of the Statute, and any delay in the start of the investigation is a delay for the victims to be in a position to claim reparations for the harm suffered as a result of the commission of the crimes within the jurisdiction of this Court Para 88; ICC-01/09-24, Pre-Trial Chamber II, Situation in the Republic of Kenya, (Decision on Victim's Participation in Proceedings Related to the Situation in the Republic of Kenya, 3 November 2010, para 5

[1061] The ICC's Complementarity Assessment: Legal Framework and ICC Jurisprudence

17 of the Rome Statute. In essence, the lack of any appropriate national-level action, technically referred to as 'national level inactivity,' is in and by itself enough to render a situation admissible before the ICC. This is because, the OTP's preliminary assessment procedure states that various factors could lead to inactivity by a State, including the lack of satisfactory legislative framework; intentional focus of trials on low-level or marginal perpetrators; or other general signs of the lack of political will or effective judiciary.[1062]

If it is established that there are or have been appropriate domestic investigations or prosecutions, the OTP proceeds to evaluating whether such trials identify with the 'potential cases' being evaluated by the OTP and in particular, whether their concentration is on those most responsible for the most grievous crimes perpetrated.[1063] This evaluation of the degree to which domestic relevant trials relate to the potential cases (at the preliminary assessment stage) is relatively unclear because the OTP's investigations are still at their initial stages. As noted above, the ICC's admissibility test at the preliminary assessment stage is wider than at subsequent trial stages, in view of the fact that there is not still a case, as understood to encompass an established set of incidents, suspects and action.[1064] Notwithstanding, there are established requirements in defining potential cases for the purpose of admissibility evaluation in this stage.[1065]

This research's analysis of whether Nigeria has undertaken any proper national- level proceedings in the country demonstrates that the Nigerian government has not initiated any criminal investigations or prosecutions into those most responsible for international crimes perpetrated by the Nigerian armed forces or CJTF. The ICC prosecutor has already said in 2017 that the Office is confronted with critical information gap on the evidence of any

[1062] OTP PE Policy, Para 48
[1063]OTP PE Policy, Para 49
[1064] The ICC's Complementarity Assessment: Legal Framework and ICC Jurisprudence
[1065] OTP PE Policy, Para 43

genuine national level proceedings on violations perpetrated by the Nigerian military.[1066] In addition, assessment of the mandates, structure and activity of the two potentially relevant committees of inquiries[1067] established in 2017, the SBI and PIP, maintain that they were never established to bring on criminal prosecutions and as a result do not comply with Nigeria's responsibility to investigate and prosecute reported perpetrators of criminal activities under international law.[1068] The terms of reference of both committees does not contain defined mandates to determine and recommend persons for investigation or prosecution.[1069] Similarly, the complete findings and recommendations of these committees are still unknown because the government is yet to release the full findings to the public. But from the brief statement made public, it is clear that the SBI - has not made any referrals or recommendations of criminal investigations despite identifying some grave violations and potential crimes, including possible unlawful arrests and detentions, congested and unhealthy detention facilities.[1070] As far as this study could confirm, the outcome of these committees, SBI and PIP have not been submitted to any competent investigative institution or agency in Nigeria with the intention to carry out further investigations or criminal proceedings. This study has thus concluded that the official results of these two investigative commissions-exonerating all high-ranking military officers-serves to conclusively prove inactivity by the Nigerian government.

With regards to crimes perpetrated by Boko Haram, this study is aware of only two cases[1071] that may possibly demonstrate internal proceedings against those mainly responsible

[1066] OTP report 2017, Para 218
[1067] *ibid*
[1068] Special Board of Inquiry; Presidential Investigation Panel to Review Compliance of the Armed Forces with Human Rights Obligations and Rules of Engagement, at 20 – 25 respectively
[1069] *Ibid*
[1070] Nigerian Army, Department of Civil Military Affairs, Text Media Briefing by Major General NE Angbazo on Report of Special Board of Inquiry to Investigate alleged Human Rights abuses against Nigerian Army personnel in the fight against Insurgency at the North East and Internal Security Operations at the South East: https://globalsentinelng.com/2017/06/16/full-text-media-briefing-maj-gen-ne-angbazo-report-special-board-inquiry-investigate-alleged-human-rights-violations/ (Accessed March 2020)
[1071] *FRN v. KabiruSokoto* (2013) and *FRN v. Khalid al Barnawi* (2018)

(top Boko Haram members) for grave crimes equal to the Rome Statute crimes. But the entire measure employed by the Nigerian government does not reflect meaningful accountability sufficient for the large scale criminality perpetrated by Boko Haram. The significant majority of cases reportedly investigated, prosecuted and/or ongoing hearings, including those examined in the 'mass Boko Haram trials which began in October 2017, seem to have targeted largely civilians trapped in the crossfire. These hearings are not only fundamentally erroneous but identify the fact, proven above, that the investigations concluded by the security forces, which have led to the mass trials of Boko Haram suspects, centred basically on crimes of alleged support or connections between some civilians and Boko Haram members, and not on the actual crimes perpetrated by Boko Haram against the civilian population.[1072] In essence, the Nigerian government appears to be prioritising investigations into the wrong crimes and against the wrong people. The OTP in its preliminary evaluation regulation, noted that 'the deliberate focus of proceedings on low level or marginal perpetrators despite evidence on those more responsible may show inactivity of a State party as well as raise serious concerns about those proceedings' genuineness.[1073] Therefore, the mass trials of alleged Boko Haram suspects cannot be relevant proceedings pursuant to Article 17 of the Rome Statute.

5.4.2 Lack of Accountability due to Unwillingness

All through the OTP's preliminary assessment report on Nigeria, reference is made to inadequate data or data gaps in relation to domestic trials.[1074] In 2017, the OTP explained these gaps in data on significant national level hearings as an indication of impunity gaps that need to be detected and rectified by relevant actors, based on the current admissibility

[1072]See above: Mass Trials
[1073]OTP PE Policy, para 48
[1074]OTP PE report 2017, para 229: where the office requires further information on relevant national proceedings, it will continue to hold consultations with the Nigerian government and with NGOs to assist relevant stakeholders in identifying pending impunity gaps and the scope for possible remedial measures

analysis.[1075] Although the OTP has not gone as far to express so, this study considers that constant lack of information or gaps are evidence of insufficient investigative measures. In 2014, the OTP stated that it was anticipating more information from the Nigerian government on domestic trials including, but not limited to, those most legally accountable for alleged crimes by the armed group.[1076] The 2014 report did not specify the purported criminal activities for which the accused were indicted, nor the significance of the cases to the OTP's preliminary assessment, instead it noted some issues concerning the information's relevance, noting that hearings in Nigeria would have to be considerably identical as those that would possibly arise from an investigation into the situation and be conducted into those most accountable for the most grievous crimes.[1077] The OTP also observed that data/information gap continued in relation to domestic trials, especially in regards to the high discrepancy between the reported number of arrests of individuals linked to Boko Haram, and data on relevant legal trials.[1078]

In 2015, the Nigerian government notified the OTP that about 150 cases in regards to Boko Haram suspects at various stages had been presented to the Attorney General of the Federation for authorization.[1079] No additional information was given regarding the rank of the Boko Haram suspects identified or the extent of any national- level trials all through the command structure of the Boko Haram armed group. In 2017, the OTP expressed that trials conducted in Nigeria pertained to low level Boko Haram members only and not the leadership.[1080] This again, highlights the failure to provide significant information by the Nigerian government. In the opinion of this research, the OTP is allowing itself be controlled by the Nigerian government by providing contradictory, inadequate, insignificant, and

[1075] OTP PE report 2013, para 224; OTP PE report 2017, para 229
[1076] OTP report 2014, p 184
[1077] OTP report 2014, p 184
[1078] OTP report 2014, p 188
[1079] The Limits of Punishment; available at: https://i.unu.edu/media/cpr.unu.edu/attachment/3128/3-LoP-Nigeria-final.pdf
[1080] OTP report 2017, p 216

delayed information. It seems like the provision of information by Nigeria of potentially relevant open case files and arrests (without- as the OTP noted in 2014 - information on consequent relevant legal trials) and partial investigative steps has served to hold the ICC at bay. This perhaps leaves the ICC in limbo, making it conclude that there is too much national level action to be certain ICC judges will find OTP conduct permissible, but way too little domestic activity to rule out the preliminary assessment deference to genuine domestic proceedings.[1081]

The OTP has stated that a 'denial to give information or to cooperate with the Court is a significant element in its complementarity examination of willingness or inability to carry-out appropriate national-level trials and may demonstrate an intent to protect individuals from criminal liability[1082] or unwarranted delay in carrying out national-level trials.' It is therefore binding on the Nigerian government to proactively engage with the OTP by providing relevant data on domestic trials if any, without necessary prompting by the OTP.

As such, it is the opinion of this research that in line with the ICCs' Pre-Trial Chambers decision, the OTP should consider that the consistent lack of data to confirm Nigeria's claim of ongoing appropriate and genuine domestic trials, indicates a situation of inactivity and unwillingness.[1083] In view of the foregoing evidence of inactivity, an OTP investigation into the Nigerian situation is potentially admissible pursuant to Article 17 of the Rome Statute.

Below we will examine the legal obligations of States under international law of armed conflicts to enforce IHL whenever its rules are violated by parties to a conflict.

[1081] Human Rights Watch "Pressure point: The ICC's Impact on National Justice, Lessons from Colombia, Georgia, Guinea, and the United Kingdom; available at: https://www.hrw.org/report/2018/05/03/pressure-point-iccs-impact-national-justice/lessons-colombia-georgia-guinea-and
[1082] OTP PE Policy, para 51
[1083] *Supra*, note, 985 at para 66

5.5 Responsibilities of States under Common Article 1 of the Geneva Conventions

We have seen Nigeria's unwillingness in enforcing IHL by holding persons who violated its rules in the Boko Haram conflict. In this light, this section will examine the earliest hope of the High Contracting Parties in Common Article 1 of the Geneva Conventions in enforcing IHL and getting justice for victims. We will analyze whether the wide-ranging reading is underpinned by the behavior of States, particularly within the parameter of third state response to humanitarian crises in the conflict between the Nigerian State and the Boko Haram insurgent group. In the final analysis, it will conclude with a general appraisal of the reading of Common Article 1 in the context of the negative and positive responsibilities of the High Contracting Parties and what is required of states in the alleged perpetrators of crimes before the International Criminal Court.

5.5.1 The ICRC Commentary of 2016

This section sets out and examines the positions espoused on CA1 by several legal scholars on the ICRC Commentary. The International Committee of the Red Cross aspires to act as an impartial and independent actor in the provision of humanitarian assistance to victims of armed conflict. The function of the ICRC that is related to the present study relates with the provisions of Article 5 of the Statutes of the International Red Cross and Red Crescent Movement which empowers ICRC to carry out any duties that would help in the implementation of IHL. It also pledged to raise alarm whenever and wherever IHL is threatened and to educate the world on the essential rules governing armed conflicts.[1084] To ensure easy understanding of the work of IHL, it has undertaken to publish commentaries on the Geneva Conventions.

In line with this mandate, the updated Commentary of the ICRC of 2016 noted that the scope of duties of Common Article 1 of the Geneva Conventions hasenlarged from the

[1084]Dinstein, Yoram "The ICRC customary international humanitarian law study" (2006) 82(1) *International Law Studies*, 6

earlier version developed in the 1950s. The updated 2016 Commentary of the ICRC explained that CA1 has evolved by introducing an undertaking to ensure respect in all circumstances, which, in turn, comprises of an internal and external component. The internal components of CA1 include a range of measures a State such as Nigeria must take to respect and ensure respect for the Conventions by its armed forces and other persons or groups (such as the Boko Haram insurgent group) whose conduct is attributable to them, not excluding its general population under its authority.[1085] On the other hand, the external element suggests that States that are not party to the conflict, including regional and international bodies,[1086] have a duty to take measures in order to safeguard compliance with the Conventions, and arguably with the whole body of IHL, by the parties to the armed conflict. Dorman and Serralvo observed that responsibilities under CA1 are *ergaomnes* responsibilities owed to the international community in general.[1087] Such responsibilities have generally been construed as a general grant of duty for third States to act to address serious violations of the Conventions or other *jus cogens* breaches[1088] (including violations of the 1949 Genocide Convention).[1089]Furthermore, they claimed that CA1 imposes specific obligations on all States – omission to carry out such obligations may result in liability.[1090]

[1085]Final Record of the Diplomatic Conference of Geneva of 1949, vol 2, Section B, p 53
[1086]Adam Roberts, "Implementation of the Laws of War in the Late 20th Century Conflicts," in Michael N Schmitt and Leslie C Green, *The Law of Armed Conflict: Into the Next Millennium*, (Naval War College, Newport), (1998) 71 *International Law Studies*, 365
[1087]Knut Dormann and Jose Serralvo, "Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations" (2015) 97(1) *International Review of Red Cross*, 2-3
[1088]Christian J Tams, *Enforcing Obligations ErgaOmnes in International Law* (Cambridge University Press, 2005) 117-57
[1089]Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnian Genocide) *Bosnia & Herzegovina v. Serbian & Montenegro*, (2007) ICJ Rep 43, Judgment, Merits, paras 161-162
[1090]*Supra*, note 1087 at 17 -"CA1 goes beyond prerogative right for third States to take proactive measures to ensure respect for IHL. It imposes not only a right to take action, but also an international legal obligation to do so. The words "ensure respect" *suggest an active duty and the term "undertake" implies a genuine obligation*, and this applies to all aspects of CA1 – both internal and external component [Emphasis added]

Under this new interpretation, CA1 obligations are not just discretionary rights to act, but duties that prescribe rules of responsibility on States. This reading moves beyond the previous construction of "may and should," instead of asserting an affirmative duty.[1091]

5.6 Scope of CA1 Obligations: Negative and Positive Duties

One area of the CA1 which the updated ICRC Commentary noted has to do with the expansion of state obligation to encompass both international and non-international armed conflicts.[1092] The expansion of the High Contracting Parties obligation to ensure respect has also broadened to encompass "negative and positive duties."[1093] Most importantly, on this interpretation, CA1 obligations to third states consist of positive duties in addition to negative duties not to support or encourage in the breach of IHL.[1094] This reading also suggests "positive" duties extend to proactive measures taken to prevent violations of the Conventions.[1095] According to Dormann and Serralvo, CA1 employs the term "ensure" in the active voice, which suggests that the scope of the obligation to ensure respect is "undoubtedly larger than just not encouraging," and also includes a series of positive obligations … High Contracting Parties have a duty to exert their influence/take appropriate steps to put an end to ongoing violations… the obligation to ensure respect should clearly be seen through the prism of prevention."[1096]

These duties suggest that States will take measures both to *prevent violations* of the Conventions along with *to stop ongoing* IHL violations. Dormann expressed that a state does avoid liability for its allies for violations of the Conventions simply by ex post intervention; instead, it must put measures in place to ensure such violations never occur from the

[1091] Jean S Pictet, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, (1958) 15-16
[1092]ICRC Commentary 2016, para 125
[1093]ICRC Commentary 2016, para 154
[1094]ICRC Commentary 2016, para 158
[1095]ICRC Commentary 2016, para 164
[1096]*Supra*, note 1087at 21-22, 24

outset.[1097] The scope of these duties indicates that duties to prevent violations will also be more extensive when States have close ties.[1098] Likewise, a third state obligation under CA1 is not the same as "right to intervention."[1099] Common Article 1 obligations are not to be employed in order to justify unilateral humanitarian interventions.[1100]

The general proscription on the use of force provided under Article 2(4) of the UN Charter provides the upper limit on measures States may employ to discharge their CA1 obligations.[1101]

5.6.1 Application of the Due Diligence Standard

This section assesses the due diligence requirement for determining third state responsibility for CA1 "to ensure" obligations. It begins with an overview of the standard and the possible sources of international law that may support its application in the CA1 context.

5.6.2 Common Article 1 State Responsibility: Due Diligence Requirement

In the updated Commentary, the ICRC endorsed "due diligence" as the standard for CA1 third States obligations that "States remain in principle free from choosing between different measures, as long as those adopted are regarded adequate to ensure respect. The duty to

[1097] Tracey Begley, Session III: Common Article 1 to the Geneva Conventions and Article 16 of the Draft Articles on State Responsibility in the framework of Co-Belligerency, Roundtable on Legal Challenges Arising in Contemporary Non-International Armed Conflicts, Sponsored by the ICRC and Columbia Law School Human Rights Institute (October 2014) (As expressed by the ICJ, the ICRC's CIHL Study, and the ICRC's 2011 Challenges Report, greater the leverage a State exercises over another State or Non-State actor, the higher the ability to implement the obligation to halt, or prevent, IHL breaches. States that have higher leverage over another State or non state actor have bigger responsibility to take action, than States that exercise little, or less, influence. Hence, States that are conducting joint operations in armed conflict, whether they are a party to the conflict or not, may have enhanced obligation to stop violations, since it would be more reasonably within their co-operating States, which would therefore to take some sort of measure to influence the breaching State. States that are conducting joint military operations presumably have a strong political, diplomatic and perhaps geographic connection to their co-operating States, which would therefore allow them to effectively influence these States. In the course of joint operations, a State may provide another State with financing, weapons logistics assistance, intelligence gathering, training, strategic advice, amongst other types of cooperation.

[1098] *Supra*, note 1087 at 18-19

[1099] ICRC Commentary 2016, para 174

[1100] *ibid*CA1 should not be employed to justify a so-called "*droit d'ingerencehumanitaire*." In principle, authorized steps must be limited to protest, criticism or even non-military reprisals. Armed intervention may only be decided within the context of the UN, and in full respect of the UN Charter. The rules on the resort to armed force (jus ad bellum) govern the legality of any use of force, even if it is meant to end grave violations of IHL; see ibid at 20: The content of CA1 is not part of jus ad bellum and thus cannot serve as a legal basis for the use of force."

[1101] UmeshPalwankar, "Measures Available to States for Fulfilling their Obligation to Ensure Respect for International Humanitarian Law" (1993) 33(1) *International Review of Red Cross*, 9

ensure respect is to be conducted with due diligence. As noted above, its content rests on the specific circumstances, including the seriousness of the breach, the means reasonably available to the State, and the degree of influence it exercises over those responsible for the violation. Unlike the negative obligation described above, it is an obligation of means, that is, the High Contracting Parties are not responsible for a possible failure of their efforts as long as they have done everything reasonably in their power to bring the violations to an end."[1102]

In a nutshell, scholars have expressed that "the obligation of result is an obligation to "succeed," whereas, the obligation of diligent conduct is an obligation to 'make every effort.'..."[1103] States can only be under obligation to exercise due diligence in choosing appropriate measures to influence belligerents to abide by the law. This does not turn the responsibility to ensure respect into a vacuous norm, since states are under the obligation to act. However, depending on the influence they may exert, to take all practical measures, as well as any lawful means at their disposal, to safeguard respect for IHL rules by all other States. If they fail to do so, they might shoulder international responsibility.[1104]

Accordingly, it was observed that the ICRC's due diligence imposes obligations on the conduct of States, but does not require them to attain specific results: states will not be held liable for failures to prevent other states from breaching the Conventions as long as they can show that they "made every effort" to prevent the violation.[1105] The intricateness of international relations, including the political dynamics to which a State might be subject, does not diminish the validity of this obligation.[1106] In light of this, close ties (diplomatic, geographic, social, or economic) between States magnifies the due diligence obligation that emanates in regards to other states under the CA1 responsibility to ensure respect for the

[1102]ICRC Commentary 2016, para 165
[1103]Riccardo Pisillo-Mazzeschi, "The Due Diligence Rule and the Nature of the International Responsibility of States" (1992) 35 (9) *German Yearbook of International Law*, 47 at 48
[1104]*Supra*, note 1087 at 18
[1105]*Supra*, note 1103 at 48
[1106]FatchAzzam, "The Duty of Thirds States to Implement and Enforce International Humanitarian Law" (1997) 66 *Nordic Journal of International Law*, 72 at 74

Conventions.[1107] This is exactly the underlying reasoning of CA1, as well as of other IHL rules that close relations between States leads to the increase of their existing obligations.[1108]

Additional guidance on CA1 could be derived from the ICJ in the case of *Bosnia and Herzegovina v. Serbia and Montenegro*.[1109] In that, the ICJ expressed that the legal duty to prevent genocide encoded in Article 2 (b) of the Genocide Convention was also one of due diligence. Regarding due diligence standard, it ruled that States are required to employ "all means reasonably available to them" and that a State incurs liability only if it has "manifestly failed to take all measures to prevent genocide which were within its power, and which might have helped to avoiding the genocide." The ICJ further added that due diligence can only be examined in *concreto*.[1110] This is the responsibility of due diligence,[1111] including the obligation to ensure respect for IHL by others.[1112] Therefore, only a case by case assessment can show whether a State has actually breached CA1.

5.7 The Pictet Commentaries

During the 1950s, the ICRC published commentaries that supported a broader reading of the Common Article 1. The commentaries expanded the scope of obligation that now includes

[1107]Hans-peter Gasser, "Ensuring Respect for the Conventions and Protocols: The Role of the Third States and the United Nations," in Hazel Fox and Michael A Meyer, *Effective Compliance* (Institute of International and Comparative Law, 1993) 28

[1108]Laurent Colassis, "The Role of the International Committee of the Red Cross in Stability Operations," in Raul A Pedrozo, *The War in Iraq: A Legal Analysis*, (US Naval War College International Law Studies, 2010) 467-8

[1109]Application of the Convention of the prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Rep (2007) Judgment, para 430: It is clear that the obligation in question is one of conduct and not of outcome, in a way that a State cannot be under an obligation to succeed, whatever the situations, in preventing the commission of genocide: obligation of states parties is instead to use all means reasonably available to them, so as to prevent genocide so far as possible. A state does not incur responsibility simply because the expected outcome is achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area of notion of "due diligence," which calls for an evaluation *in concreto*, is of critical importance. Various parameters operate when examining whether a State has duly discharged the obligation concerned. The first, which varies greatly from State to another, is clearly the capacity to influence.

[1110]*Ibid*

[1111]Robert Barnidge, "The Due Diligence Principle under International Law" (2006) 8 *International Community Law Review*, 118

[1112] Toni Pfanner, "Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims" (2009) 91(874) *International Review of the Red Cross*, 305

the need to "ensure respect of the terms of the Convention by others."[1113]The author expanded the scope of the obligation to ensure respect on others, leading to a broader reading of the terms of Common Article 1 of the Geneva Conventions.[1114] This implies that the duty to protect victims of armed conflict also rest with others. Following from here, the responsibility for humanitarian protection according to Pictet must not be restricted among signatories to the Convention but that they "should do everything in their power to ensure that the humanitarian principles underlying the Conventions are universally applied."[1115]

One can argue that the wording employed by Pictet (may and should) suggest a prerogative, where States are recommended to take necessary actions that are not necessarily obligatory. These differences are more pronounce in distinguishing the terms. *Pouvoir* is French for entitlement to act as against *devoir*, which stands for an obligation.[1116] Some scholars have also queried the interpretation of the provision as an obligation, arguing that it is not exactly the same as an "undertaking." Scholars, including FrédericSiordet, noted that whenever States interpret the provision as an obligation, it gives rise to a situation where the "the private right of belligerents was substituted [for] the general interest of humanity, which demanded scrutiny, no longer as a question of right, but of duty."[1117]In this regard, the word undertake appears to be in tandem with the 2016 updated commentary, which is interpreted as a more duty to take positive measures that will either prevent or minimize acts that violates the fundamental principles of IHL.

[1113] Jean Pictet, "Commentary on the Geneva Conventions of August 12 1949" Volume I (1952)
[1114]*Ibid*, "In the event of a Power failing to fulfill its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavor to bring it back to an attitude of respect for the Conventions. The proper working of the system of protection provided by the Convention demands in fact the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally
[1115]*Ibid*
[1116] Jean PictetCommentaire: IVème Convention de Genève Relative au Traitement des Prisonniers de Guerre, 1960 at 21
[1117]FrédericSiordet, The Geneva Conventions of 1949: The Question of Scrutiny (ICRC, Geneva, 1953) at 21

Furthermore, the ICRC noted that, pursuant to Article 32 of the Vienna Convention on the Law of Treaties, drafting records serves only as supplemental avenue of interpretation.[1118] Article 31(3) (a) (b) of the Vienna Convention demonstrates that subsequent state practice, later agreements between parties, and internationally applicable norms are likely to be more relevant in determining a treaty's meaning than drafting documents.[1119]

At any rate, the acceptance of an obligation to ensure respect by others for both international and non-international armed conflicts was explicitly acknowledged after the adoption of the Geneva Conventions and is also what emanates from an analysis of the (more relevant) subsequent practice and judicial precedent in the application of the treaty.

5.8 Responsibilities of States Pursuant to Common Article 1 to the Geneva Conventions in the Boko Haram Armed Conflict in Nigeria

As reviewed above, Common Article 1 obligations of State parties – as High Contracting Parties – under the Geneva Conventions are outlined in a clear and unambiguous fashion. States, as earlier noted, have an obligation to respect and ensure respect for the four Geneva Conventions in all circumstances. This, in effect, means that States that are not hostile parties in a given hostilities – commonly known as Third Party States – are required to abstain from supporting violations, rather take proactive stance to bring about respect for IHL.[1120] Common Article 1 responsibilities apply in any type of conflict whether international or non-international[1121] and relate to all conflicting parties. The responsibilities of Common Article 1 are also relevant in times of peace.[1122]

[1118]Vienna Convention on the Law of Treaties (1969), Article 32
[1119]*ibid*
[1120]Verity Robson "The Common Approach to Article 1: The Scope of Each State's Obligation to Ensure Respect for the Geneva Conventions" (2020) 25(1) *Journal of Conflict and Security Law*, 101
[1121]ICRC Commentary of 2016 "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all situations. This wording covers not only the provisions applicable to international armed Conflict, including occupation, as defined by Common Article 2, but also those applicable non-international armed conflict under Common Article 3 which forms part of the present convention … Para 125
[1122] ICRC Commentary of 2016 " The obligation to respect and to ensure respect for the Conventions is not limited, however, to armed conflict, but applies also in peacetime… Para 127

As earlier discussed in this chapter, the ICRC's updated commentary on the Geneva Conventions conclude that CA1 imposes two broad obligations on third States to ensure respect for the Conventions. This duty to ensure respect by third states consists of both a negative and positive obligation. "Under the negative duty, High Contracting Parties may neither encourage, aid or assist in violations of the Conventions by parties to a conflict (in our case Nigerian forces and Boko Haram armed group).Under the positive responsibility, they must do everything reasonably in their power to prevent and bring such violations to an end." The continued third states supports for Nigerian armed forces in its conflict with Boko Haram arguably violate both these negative and positive obligations.

5.8.1 International Military Assistance: Who are they Assisting – Nigeria or Boko Haram?

Measures by third states to promote and to ensure respect for IHL in situations where they are not a party to the conflict are clearly important as well as obligatory. But the reality of contemporary armed conflicts, particularly the Boko Haram situation in Nigeria, shows that much more needs to be done. A fundamental part of CA1's obligation to ensure respect is prevention, including steps that work against the destruction of life and means of survival in conflict settings. An important area is the Arms Trade Treaty (ATT) of 2013.[1123] This was an important turning point considering the resurgent nature of the international arms trade after a noticeable dip in the aftermath of the Cold War.

As set out by Swisspeace, the ATT lays out "robust international rules to stop the flow of weapons and munitions to states when there is an "overriding risk" they would be used to perpetrate war crimes or grave human rights violations" with the main objective of contributing to global peace and security, and a diminution in human suffering.[1124] With regards to the criteria states may employ to evaluate the risk of transferring weapons, the

[1123]UNGA Res 67/234 B, 2 April 2013 (Arms Trade Treaty)
[1124]Article 7(1) (b) (i) and 7(3)

ICRC has proposed variety of indicators, including the recipients past and present IHL record, alleged intention of the recipient – as expressed through its own commitments – and the recipient's ability to ensure that weapons in question are utilized in a manner that is inconsistent with IHL.[1125]

A growing number of contemporary conflicts involve several forms of coalitions, alliances or partnerships that bring to the fore the relevance of Common Article 1 and the significance of all concerned parties using their influence, and power to ensure respect for IHL. As in all cases of threat, prevention is better than efforts to cure the harm inherent in armed conflicts scenes. This well-known truism has particular resonance in terms of Common Article 1 and related responsibility.

States often give support such as training, weapons, intelligence gathering to allies or partners that are parties to armed conflicts. Such assistance will, almost invariably, translate into a privileged position of influence as well as important responsibilities to ensure respect for IHL. It is worth emphasizing that the greater the support rendered to a warring party the more extensive the steps required on the part of the supporting third state.

The importance of Common Article 1 in the context of the Boko Haram armed conflict provides valuable insights to the way in which States allied with Nigeria - country that has committed grave human rights violations in the Boko Haram conflict - question the depiction of their responsibility and the rules that apply in this context. This is because the Nigerian government significantly relies on military equipment from allied countries such as the purchase of $593 million American A-29 Super Tucanos,[1126] British military hardware including AK47s, grenades, bombs, machine guns, and missiles.[1127] Nigeria also acquired

[1125]ICRC, *Arms Transfer Decisions: Applying International Law Criteria*, (Geneva, 2007) 9-15
[1126] US Approves A-29 Super Tucano sale to Nigeria; available at: https://www.defensenews.com/air/2017/08/03/us-approves-a-29-super-tucano-sale-to-nigeria/#:~:text=Sgt.,the%20militant%20group%20Boko%20Haram. (Accessed August 2020)
[1127]Armed Extraction: The UK Military in Nigeria; available at: https://platformlondon.org/p-publications/armed-

unknown number of military vehicles consisting of VT-4 battle tanks and self-propelled howitzer from China,[1128] including twelve Mi-35M combat helicopters from Russia.[1129] In addition, Nigeria has also received financial assistance from these countries; the USA assisted Nigerian military and police with US$6.3 million in 2014, up from US$6.2 million in 2013.[1130] Similarly, the United Kingdom has in 2017 supported the Nigerian government with 200 million pounds sterling to fight Boko Haram among others.[1131]

This in effect means that four out of the five Permanent members of UNSC are substantially involved in a conflict that has proved deadly for civilians both as a direct result of bombings and, indirectly, as a result of indiscriminate attacks and destruction of civilian property and other infrastructure.[1132] It is important to reiterate that all State Parties, including P5 members,[1133] have clear responsibilities to conduct in accordance with international law. The provision of Common Article 1 requires them to use their influence to ensure and uphold fundamental principles of international humanitarian law in order to protect the lives, and survival of victims, and other civilians stuck in the Boko Haram conflict in northeast Nigeria.

5.8.2 Empowering Boko Haram

However, there are some major concerns here: first, most of this sophisticated military hardware end up in the hands of the insurgent group.Boko Haram has on several occasions

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extraction/#:~:text=Despite%20documented%20cases%20of%20human,of%20grenades%2C%20bombs%20and%20missiles. (Accessed August 2020)

[1128]Nigerian Army Acquires more Sophisticated Military Equipment to fight Boko Haram; available at:https://www.msn.com/en-xl/africa/nigeria/nigerian-army-acquires-more-sophisticated-military-equipment-to-fight-boko-haram/ar-BB12JhBE (Accessed August 2020)

[1129]Russia Supplied Nigeria with Mi-35M Attack Helicopters, available at:https://www.defense-aerospace.com/articles-view/release/3/206618/russia-delivers-six-of-12-mi_35m-gunships-to-nigeria.html (Accessed September 2020)

[1130]Security Assistance Monitor, available at: https://www.securityassistance.org/nigeria (Accessed September 2020)

[1131]UK Government unveils 200 million pounds in aid to help fight Boko Haram in Nigeria, available at:https://www.theguardian.com/world/2017/aug/30/uk-government-announces-200m-care-package-fight-famine-caused-by-boko-haram (Accessed September 2020)

[1132]Olumuyiwa B Amao "A Decade of Terror: Revisiting Nigeria's Interminable Boko Haram Insurgency" (2020) 33 *Security Journal*, p 357

[1133]UNSC Current Permanent and Non-Permanent Members; available at:https://www.un.org/securitycouncil/content/current-members#:~:text=The%20Council%20is%20composed%20of,Dominican%20Republic%20(2020) (Accessed August 2020)

attacked military base and barracks – looting heavy weapons, equipment, guns, ammunitions, including armoured vehicles, further killing and destroying civilian lives.[1134] As a result Boko Haram's violent activities, some thousands of lives were lost, and displaced over 2 million people, with over 14 million people in dare need of humanitarian assistance. Corruption fuelled under-resourcing of frontline soldiers has indirectly benefitted Boko Haram. Photographs and video footage testify to the group's use of captured military trucks and sophisticated arms stolen after raiding military barracks. Furthermore, the Nigerian defence sector corruption has also weakened the military's counterterrorism capability – with allegations of embezzling $15 billion since 2011, further strengthening Boko Haram. In March 2020, for example, the Theatre Commander of Operation Lafiya Dole, Major General Olusegun Adeniye – while in the frontline fighting Boko Haram with his troops, lamented how his men were outgunned and ambushed by the group. In a video that went viral, he urged the military authorities to supply them with weapons and accurate intelligence to combat the group in the northeast region.[1135] In an interview, Brigadier MD Dala, sector II Brigade, Yobe state, also claimed that "the Nigerian Army is not ready to fight Boko Haram," explaining that soldiers were not being given enough weapons and ammunition to take them (Boko Haram) on.[1136]

5.8.3 Negative Obligation

Starting with the negative obligation, as previously discussed, the ICJ in *Nicaragua* case observed that CA1 imposed on USA "an obligation not to encourage persons or groups engaged in the conflict in *Nicaragua* to act in violation of the rules of Article 3 Common to the four Geneva Conventions. The Court held that the United States was aware of allegations

[1134]Boko Haram vows to take on AU Troops, available at:https://www.youtube.com/watch?v=GV8iHJOTJ-s (Accessed September 2020)
[1135]Nigerian Army Removes General in viral video asking for weapons to fight Boko Haram, available at: http://saharareporters.com/2020/03/31/breaking-nigerian-army-removes-general-viral-video-asking-weapons-fight-boko-haram (Accessed September 2020)
[1136]Interview with General MD Dala, Sector II Brigade, December 2017

that the contras were violating IHL and ruled that knowledge of these allegations was sufficient to indicate the foresight of future violations by the non-state actors.[1137] Given the fact that the United States knew that IHL violations were "likely or foreseeable," it had a legal duty to stop the provision of any assistance that could broadly be construed as encouragement. Because it had not done so, it had breached its responsibility under CA1.

In the current case of Boko Haram, these States (US, UK, China and Russia) may likewise be in violation of the negative duty under CA1. The United Kingdom and United States have particularly provided more support in the form of funds - aside the arms and ammunition they have provided. These countries provided support despite knowing of credible allegations that Nigeria has continuously violated IHL. The U.S for example, has in the recent past, held up sales of weapons to Nigeria, citing military's human rights violations by the Nigerian army.[1138] In one instance, up to 236 people died after the Nigerian air force bombed an IDP camp in Rann, Borno State, Nigeria.[1139] They restarted sales of weapons to Nigeria only after receiving assurances that Nigeria would take more precautions to avoid abuses and/or weapons ending in the hands of Boko Haram. However, States that make good faith effort to encourage belligerents to comply with IHL can still be held to violate their CA1 responsibilities. In *Nicaragua*, the Court found the US accountable for violating CA1 despite the existence of a CIA manual that US claimed was intended to discourage the contras from breaching IHL. Indeed, the Court took the manual's recommendations aimed at 'mitigating' the violations by the contras as evidence that the United States was aware that future violations were likely or foreseeable.[1140] Thus, it appears that violations of the negative duty

[1137] *Nicaragua v. United States of America*, (1986) ICJ Rep para 220
[1138] The White House, Remarks by President Obama before Bilateral Meeting with President Jonathan of Nigeria, September 2013, available at:https://obamawhitehouse.archives.gov/the-press-office/2013/09/23/remarks-president-obama-bilateral-meeting-president-goodluck-jonathan-ni (Accessed September 2020)
[1139] Chika Oduah, "Death toll in Nigeria IDP Camp Bombing climbs 236, available at:https://www.voanews.com/africa/death-toll-nigeria-idp-camp-bombing-climbs-236 (Accessed September 2020)
[1140] *Supra*, note 1137 at paras 255-6

not to encourage or induce violations of the Geneva Conventions might not be mitigated by recommendations or assurances.

That is particularly true in situations where, as here, there is evidence that efforts to reduce or lessen IHL violations may have been ineffective. Indeed, Nigeria's commission of IHL violations after it assured the USA it would put measures to lessen them – as well as warnings by studies such as this research, that Nigeria was incapable of complying to IHL because of serious, systematic problems within its armed forces – demonstrate that the IHL violations in Nigeria may well have been 'likely foreseeable' under the *Nicaragua* standard. Accordingly, the routine support by these States could be construed as encouragement in violation of Common Article 1's negative obligations.

5.8.4 Positive Obligation

In accordance with the updated ICRC commentary, this positive duty requires States "to exercise due diligence in choosing appropriate steps to persuade parties to a conflict to abide by the law." States must take "all necessary steps, as well as any legal means at their disposal" to "ensure respect" for the Geneva Conventions. There is no bright line rule for determining third state duties. Instead, the commentaries provided a sliding scale in which "the responsibility to ensure respect for the Geneva Conventions is particularly strong in the situation of a partner in a joint operation, even more so as this is closely related to the negative duty neither to encourage nor to aid or assist in violations of the Conventions."[1141] In the Bosnian Genocide case, the Court stated that due diligence can only be assessed in *concreto*.[1142] This is the case with any responsibility of due diligence,[1143] including the responsibility to ensure respect for the Conventions by others. Hence, only a case by case examination can disclose whether a State has truly violated CA1.

[1141]ICRC Commentary 2016, para 167
[1142]*Supra*, note1089 at para 430
[1143]*ibid*

Therefore, whether these States have truly violated their positive responsibility under Common Article 1 may depend on the adequacy of each of these State's mitigation measure. According to the ICRC's due diligence standard, States may discharge their positive duties under Common Article 1 by undertaking efforts to reduce and prevent violations. That IHL violations by the Nigerian forces have continued does not particularly mean that these States have failed to discharge their positive obligations. This is because; the due diligence does not require states to attain specific results. Rather, the responsibility has been interpreted as simply requiring third states to "make every effort" to prevent the violation.[1144] Whether the assurances that especially the UK and US receive from the Nigerian government mitigate their positive duties under Common Article 1 turns on the credibility of the assurances. If Nigeria's assurances cannot be regarded credible – or if the Nigerian military was incapable of adhering to IHL rules in its fight against Boko Haram, regardless of the assurances – then these states were obligated not to provide any form of support. By this reasoning, these states would be obliged to cease its assistance for Nigeria and it may also be required to adopt further positive steps, such as diplomatic pressure and public denunciations, in order to avoid further liability.

5.8.5 Failure to Conduct a Genuine Investigation

As demonstrated in this chapter, Nigeria's government has responded with a heavy hand to Boko Haram's violence. In the name of ending the group's security threat to Nigeria, the Nigerian forces have engaged in excessive use of force, physical abuse, secret detention, sexual violence, torture, and extrajudicial killings of thousands of lives. Despite ample evidence about the violations perpetrated by the security forces, the Nigerian military and civilian authorities have consistently failed or rather not willing to take meaningful action to

[1144] *Supra*, note 1103

bring the perpetrators to justice. Both the PIP and SBI[1145] investigative panels that were established to investigate the alleged atrocities committed by the Nigerian security - broadly concluded that all reports against the Nigerian army and government as baseless accusation. In 2014, at a workshop on civil-military cooperation, the Nigerian authority that the government takes all reports concerning human rights violations by the security forces very seriously, but "Findings, have generally shown that these reports are, in the main, exaggerated."[1146] The Nigerian government have repeatedly assured the world that they would investigate all allegations, but have consistently failed to provide any tangible information on the progress of these allegations.[1147] Instead, the Nigerian government has refused to constitute the National Human Rights Commission, saddled with the responsibility of investigating and reporting cases of human rights violations since 2015.[1148]

5.8.6 Lack of Genuine Domestic action

Article 17(1) (b) of the Rome Statute states that cases are inadmissible before the Court if they have been previously investigated by a State which has jurisdiction over them and the State has resolved not to prosecute the concerned person(s), except where such decision stems from the unwillingness or incapacity of the State to genuinely prosecute- so called sham proceedings. Article 17(2) of the Rome Statute outlined the requirements for evaluating unwillingness or inability to genuinely conduct the trials and to examine whether trials were carried-out in a way consistent with the intent to hold persons accountable for crimes of the Rome Statute.[1149]

[1145]See above in this chapter section on PIP and SBI

[1146]Insurgency: President Jonathan Advocates for Civil-Military Cooperation, available at:https://thewillnigeria.com/news/insurgency-president-jonathan-advocates-improved-civil-military-cooperation/ (Accessed September 2020)

[1147]Nigeria: Boko Haram – ICC May Open War Crime Investigations in Nigeria; available at:https://allafrica.com/stories/201912070083.html (Accessed September 2020)

[1148]HURIWA to petition Buhari to UN over failure to constitute NHRC Board, available at:https://guardian.ng/news/huriwa-to-petition-un-over-buharis-failure-to-constitute-nhrc-board/ (Accessed September 2020)

[1149] OTP PE Policy, para Article 17(2) and paras 50-9

This research's analysis of the potentially effective national-level trials set out in the OTP's preliminary assessment report 2017,[1150] in respect of both the Nigerian armed forces and the Boko Haram armed group, indicates, based on this study's findings - the trials were mostly sham trials and demonstrate the unwillingness of Nigeria to genuinely conduct investigations and prosecution of offenders reasonably suspected of committing international crimes.

5.9 Conclusions

This chapter has analysed the twin issues, which largely results in the ineffective enforcement of IHL in the Boko Haram armed conflict in Nigeria. First, the chapter has demonstrated that the Nigerian government did not exhibit the *political willingness* to prosecute the military and the CJTF for violating IHL rules, and as such committed heinous crimes of sexual violence of rape, enforced prostitution, torture, and others that constitute war crimes and crimes against humanity. Likewise, as a whole; the country has failed to bring Boko Haram perpetrators to justice. Second, the provision of Common Article 1 of the Geneva Conventions was examined in the context of our study, and concluded that Common Article 1 is no more than a reminder of all obligations (negative and positive) to respect the Conventions even if they are not party to a given conflict, and that this has progressively acquired an unspecified recommendatory meaning for States to adopt a lawful step to induce Nigeria not only to comply with the Conventions, but they also have an obligation not to encourage, in whatever way, the violations of the Conventions.

It is very obvious that no genuine investigations and prosecutions has been undertaken against the officers of the Nigerian Army and members of the Civilian Joint Task Force. To the point that the SBI and the PIP purportedly investigated allegations against the officers of the Nigerian Army and Civilian JTF members – and concluded that there is no basis to

[1150] OTP PE report 2017, para 218

proceed to criminal trials. However, all available evidence shows the commission of serious crimes of rape, sexual exploitation, enforced prostitution, arbitrary arrest and detention that constitute international crimes of war crime and crime against humanity as highlighted in chapter 4 of this thesis. The establishment of the SBI and PIP sought to conceal the perpetration of crimes, and to avoid a full inquiry by the OTP, as well as to provide a veneer of accountability in Nigeria, and specifically, to protect military officers and the CJTF from criminal responsibility.[1151] Therefore, it is fair to conclude that the trials concerning crimes committed by the Nigerian Armed forces have not been adequate to satisfy Nigeria's willingness under international law to prosecute those who committed crimes in the Boko Haram armed conflict.

There are insufficient investigations or prosecutions of Boko Haram members, particularly Boko Haram leaders, or those most liable for crimes under international law perpetrated by the armed group. The research has established that only about ten Boko Haram suspects have been found guilty for committing grave crimes such as terrorist acts, killings or hostage takings since the Boko Haram conflict started in 2009. In reality, until the mass Boko Haram proceedings, which started in October 2017, only about 60 Boko Haram suspects were sent to trial. In response to the researcher's request for information the Ministry of Justice stated in November 2017 stated that only 9 Boko Haram suspects had been convicted with regards to Boko Haram activities.[1152] Furthermore, this research has demonstrated that mass proceedings of alleged Boko Haram suspects undertaken from 2017 and through the subsequent years are not relevant for any determination of the admissibility of the cases concerning crimes perpetrated by Boko Haram. Importantly, applying the OTP's own

[1151]In its admissibility examination of domestic level accountability measures in Burundi, the OTP noted that 'to the degree that the domestic government have cleared officials of the security forces as claimed physical perpetrators of any wrongdoing, … the investigations conducted into these allegations were not genuinely undertaken, but were carried out for the purpose of protecting the individuals concerned from criminal responsibility.

[1152]Interview with the Ministry of Justice Nigeria, November 2017

standards, the Nigerian government's proceedings in the mass proceedings seem not to have targeted substantially the same criminal conduct as required for the purposes of complementarity and the ICC's admissibility determination.

Consequently, this research considers that States under Common Article 1 use their influence to require the OTP to make a *propriomotu* application, in line with Article 15 of the Statute, to the ICC chamber to request authorization to proceed to full investigation. This is because, there is "No such thing as innocent by standing" stated Nobel Laureate, Seamus Heaney when reflecting on years of war and how knowledge of its cruelty and agony involves us all.[1153] It is a reminder that indignation at the pain and sorrow of war is never enough when the task is to be assertive and determined in challenging the brutality and cruel consequences of contemporary warfare as substantiated by this research in the ongoing Boko Haram armed conflict.

[1153]Henry Hart "Seamus Heaney: Circling Back" (2006) 114(3) *The Sewanee Review*, p 456

Chapter Six

6.0 Conclusion

Boko Haram's attack capability and its impact on Nigeria have substantially decreased since writing this thesis. The Nigerian military has satisfactorily pushed the insurgents out of the towns and villages they previously held, leaving them to wither and reinvent themselves in the harsh environments of the Sambisa Forest and Lake Chad. The victims of the insurgency, however, remain dispersed across the country, languishing in IDP camps with no home with which to return. The consequence of this insurgency has been largely shouldered by the masses in the northeast of the country, further dividing the country. Meanwhile, the government continues to face challenges from a pervasive culture of corruption,[1154] as well as a resurgence of a national sentiment among supporters for a secessionist Biafra in the southeast of the country.[1155] Certainly there is much to do for a more peaceful and united Nigeria, that share a common interest in development that advances human security and dignity.

As noted in the introduction, any research on Boko Haram takes place within a grey area. As far as I am aware, there are no embedded journalists among the insurgents. Indeed there seems to be much competition in the media to appropriate the discourse on the insurgency and make gratuitous claims. Who sponsors them? What role, if any, do politicians play in perpetuating the crisis and/or does the Nigerian authority has a hand in it? With so many stories and a dearth of substantial evidence, these questions, for the time being, remain unanswered.

This thesis has attempted to regroup the competing narratives that dominate Nigeria and international politics. Some of the claims appear contradictory, others are downright

[1154]Corruption worse in Nigeria, new Transparency International Report says, available at: https://www.premiumtimesng.com/news/top-news/374090-corruption-worse-in-nigeria-new-transparency-international-report-says.html (Accessed October 2020)
[1155]Country Policy and Information Note: Nigeria: Biafran Separatists, April 2020, available at: https://www.justice.gov/eoir/page/file/1267611/download (Accessed October 2020) p 7

absurd, but most are sourced from credible people who have been closely observing the symptoms of the insurgency and have an intimate knowledge of the country. This has helped bring some clarity to our explanation. I have attempted not to make too many assumptions but have ground my analysis on the existing evidence and prevalent reports. It is perhaps easier to assess the impact of this insurgency on the social and political fabric of the country. A focus on the political willingness of the government, the judicial system, the security forces, and the international community can also reveal some of the challenges in the effective enforcement of IHL to the threat of Boko Haram.

6.1 Summary of the Study

The foregoing has been an exploration of the ways in which international humanitarian law could be improved with a view to adapting more effectively for the protection of civilian population; especially women and girls, from sexual violence in the Boko Haram armed conflictin Nigeria. The main aim is to deny impunity to those who commit such crimes from both sides of the conflict. This research began, in chapter 1, with an attempt, to understand a country that is unfamiliar to many, and help contextualize the environment in which Boko Haram was able to thrive.

In chapter 2, we explored the differences in the law applicable to international and non-international armed conflicts. This difference is more pronounced in relation to the applicable treaty laws. The characterisation of armed conflicts in particular can be very complex. These complexities are somewhat related to the legal classifications themselves, whose content is often unclear or ambiguous in the treaties that establish them. In that context, the development of customary international law is indispensable because it allows those classifications to be incrementally expressed in concrete terms by examining them in the light of practical cases. The most remarkable contribution in this respect is perhaps that of the ICTY in relation to the notion of non-international armed conflict. In this light, we explored

the ways in which a non-international armed conflict may become an international armed conflict. First, the invaded State may recognize the situation as an act of war. A second way in which the conflict will be governed by the rules of international law is when the situation amounts to a war of national liberation. Third, the most common way in which an internal armed conflict will be internationalized is through intervention by a foreign State. This can occur in two ways: intervention through the troops of a foreign state, and control over a non-state armed group by a foreign state. In both ways, the facts will prove decisive. Since the turn of the century, a third type of armed conflict has been contended, one that is described as a transnational armed conflict or extra state conflict. Advocates of this type of conflict label that they are neither international armed conflicts, because they are not fought between a state and a non state armed group, nor are they non-international armed conflicts because they cross a state border (as we have seen in the Boko Haram armed conflict). However, such conflicts are no more than a subcategory of non-international armed conflicts. Conventional 'internal' armed conflicts such as the Boko Haram armed conflict usually have some sort of cross-border element, with the armed group (Boko Haram) being based on the territory of neighbouring State (Nigeria), with their presenceoverspilling to other territories. Even though some recent non-international armed conflicts have involved States and armed groups that are not located in adjacent territory, the deciding factor is one of degree rather than type. In essence, what distinguishes non-international armed conflict from international armed conflict is not the geographical location but the parties to the two types of conflict.

Even though the main focus of the study is on "the analysis of the challenges of effective enforcement of international humanitarian law in the fight against Boko Haram in Nigeria," the exercise began with a review of some plausible explanations of the atrocities committed in the course of security operations against Boko Haram in north-east Nigeria, as a general phenomenon. From there, we focussed on the review of the particular brand of

inhumanity that women and girls are made to endure in times of adversity – that is, sexual violence.

In chapter 3, we explained the research approach of the study. This study follows years of research and monitoring conducted by the research candidate into the widespread human rights violations, and grave crimes, including war crimes and crimes against humanity, committed in the context of the non-international armed conflict between the Nigerian armed forces, and Boko Haram armed group in North-East Nigeria. It involves more than 67 interviews, conducted in person and by phone with survivors, victims, their relatives, eyewitnesses, human rights bodies, lawyers and military sources. The field investigation was conducted over a period of 4 months in Nigeria. Over the years, I have been closely monitoring public reported inquiries, judicial proceedings and other claimed accountability mechanisms conducted in Nigeria with respect to grave crimes, and human rights abuses perpetrated by both sides to the conflict in the North-East.

In chapter 4, we explored the evil of sexual violence in the Boko Haram armed conflict. The chapter identified two major challenges that have inhibited effective enforcement of IHL in the fight against Boko Haram. The first challenge concerned the high level of indiscipline on both sides of the war, particularly the Nigerian security forces. The second challenge related to poor judicial infrastructure, which has further restricted access to justice for the victims of sexual violence. It also suggests that in the effort to achieve a legal framework which will contain the crime of sexual violence during armed conflicts in general, there is a need to formulate a more effective and clearer definition of rape in both international and domestic laws. The part envisaged for such a definition in the analysis of criminal responsibility will include legal developments, in terms of procedure that will impede perpetrators of sexual violence during armed conflicts from enjoying impunity. This is because the main objective of criminal responsibility may be defeated if victims of sexual

violence during armed conflicts are induced to refrain from taking part in rape hearings due to an unhealthy focus on their own actions at the time of the crime. This follows from a definition of rape that unwittingly puts the victims on trial, by constantly focusing on whether they consented or not. The main focus should rather be on the hostile environment of the occasion, rather than whether the conduct of the victim could have amounted to consent or not. It is therefore, submitted by this study that, a definition of rape which concentrates on the hostile environment of the occasion is more likely to achieve the ends of containment of sexual violence than one which constantly requires the prosecution to prove that the victim did not give consent to the act. In addition to reviewing the definition of rape in domestic legislation of Nigeria, this study suggests that the Penal and Criminal Codes of Nigeria be updated to include coercive circumstances in the list of conditions of proving the act of rape in conflict situations such as the case in our study – Boko Haram victims.

Most fundamental to this research is the legal debate in relation to the crime of genocide. Such debate relates to whether the conviction of Boko Haram members for genocide of rape of the Chibok girls requires the prosecution to prove that they (Boko Haram members) possessed particular intent to destroy at least a significant part of a protected society. While this debate is often thought to engage the question of the mass of the victims against whom acts of genocide had been actually perpetrated, the debate really only engages the element of intent to commit genocide and not the actus reus of genocide. In order words, the argument does not require that the acts amounting to a crime be committed against a significant part of the protected society; it is rather that the perpetrator is seen to have intended the destruction of a significant part. Therefore, the conception of rape as an act of genocide must remain largely unperturbed by the implications of this debate, as long as the essential intent is established on the part of the perpetrator. Thus, rape may continue to be

conceived as an act of genocide, whether or not it had been indicated that a significant part of a given society had been victims of acts of genocide – including the rape itself.

In general, the chapter examines the experiences of women and girls who fled their homes and villages that had been controlled by Boko Haram, as the military intensified its operations. First-hand testimonies describe the appalling actions against them, especially of the Nigerian forces, both in IDP camps and military barracks.

Chapter 5 builds on the weak judicial system and violations by Boko Haram and the Nigerian military along with Civilian JTF members, including sexual violence, rape, sexual exploitation, torture and rape, which in chapter 4 of our study identified as amounting to war crime and crimes against humanity. Premised on the political will of the Nigerian government and the legal obligation vested upon States in international law, this chapter critically examines the International Criminal Court's Office of the Prosecutor (OTP) tenth-year preliminary assessment into alleged crimes committed in the context of the armed conflict in northeast Nigeria, together with the government's failure to investigate and prosecute alleged perpetrators of criminal offence under international law. First, the chapter demonstrates that most of the investigations and prosecutions conducted against alleged members of Boko Haram do not relate to the appalling crimes against civilians perpetrated by members of the group and that they are not genuine proceedings. Similarly, this study reveals that, in the last ten years, the Nigerian government has not conducted any relevant criminal trial related to Rome Statute crimes against officers of the Nigerian security forces and its allied Civilian JTF members. Ten years since the opening of the preliminary examination of Nigeria by the OTP, this research submitted that the Nigerian government has not undertaken any relevant criminal trials into the war crimes and crimes against humanity committed by both sides of the Boko Haram armed conflict. This study, therefore, urges the OTP to open a formal investigation in Nigeria for her unwillingness to enforce IHL rules.

From the foregoing challenges of Nigeria's lack of willingness to hold perpetrators to account, this study sets out the principal purpose of Common Article 1 under international humanitarian law so that States concerned about the atrocities that civilians, especially women and children, are made to endure in the Boko Haram armed conflict, may find common cause in challenging the inhumanity that is contemptuous of human beings and the untold suffering it imposes on millions in northeast Nigeria for over a decade. It is an obligation - not an option, upon States to stand not only for a secured Nigeria, but to ensure that - nations prosper when they allow women and girls to reach their full potential.

6.2 Lessons Learned from the Study

Boko Haram has in the past re-emerged from the ashes, adjusting to new environments and reinventing its purpose and strategy as it faces difficulties and opportunities. In military a perspective, the group operates with a few thousand 'hard' fighters and a supporting crew of a couple of thousand recruits.[1156] This makes up a moderate troop but hardly a military strength to be reckoned with. The hit and run method, the use of women and children suicide bombers, as well as indiscriminate brutality arguably cause more horror than the actual number of casualties. This also discredits the legitimacy of the Nigerian authority by highlighting its inability to take charge of the territory and protect its citizens. The armed group has also benefitted from the confusing and fear mongering reports typically present in the media and the unfounded accusations made by some dishonest politicians. Certainly, the hint of rumours that "Boko Haram is approaching" can trigger sweeping civilian displacement, clogging up the already overburdened IDP camps.[1157]

[1156]Boko Haram degraded but remnants still operate in Northeast – Buhari,' available at:https://www.premiumtimesng.com/news/headlines/351602-boko-haram-degraded-but-remnants-still-operate-in-northeast-buhari.html (Accessed October 2020)
[1157]Nigeria: 'We live in fear of Boko Haram,' available at:https://www.theguardian.com/world/2014/may/02/nigeria-we-live-in-fear-of-boko-haram (Accessed October 2020)

Boko Haram's operations since 2018 has been typical of an insurgent group or guerrilla group, geographically restricted and causing relatively fewer casualties. The Nigerian armed forces confiscation of many of the small arms and vehicles the armed group previously used and the interruption of its supply routes have forced them to review their strategy. To many, the military's successes arrived too late. Over two (2) million people are still displaced, abducted scores of women and girls that are still missing, dozens of women are still sexually exploited, and thousands have been killed.

Although some casualties are unavoidable when conducting counterinsurgency operations, military strength alone is hardly the most effective way to counter a terrorist group. Inasmuch as the armed group emerge and secure support from deep rooted injustice and insecurity, the country's use of force merely perpetuates this feeling of persecution and estrangement. Rather, short and long term investments in the economy, starting with key infrastructure, will help in establishing the government's presence, interest, and legitimacy in the area. The use of military force without providing basic services expected from the country can have the opposite effect by marginalizing the population from their "caretakers." This can therefore be an obstacle when conducting a counterinsurgency operation where community cooperation is an advantage to succeed.

Furthermore, the international commitment to the conflict by way of selling sophisticated arms have also played a part in compounding the situation, allowing for Boko Haram to grow in scale by raiding military barracks and stealing most of these weapons. Although British and American military officers have helped in training paratrooper and ranger brigades and helped in the counterinsurgency strategy since 2015, one of the deficiencies identified with such assistance is the lack of a trickle-down effect, with much of

the training focusing on the top officers, which leaves the low - ranking personnel with little to no impact.[1158]

In the final analysis, we have regrettably - seen that there are little or no international standardised enforcement mechanisms to make readily and uniformly realisable the objective of the instruments of international humanitarian law, including the Hague Convention Respecting the Laws and Customs of War on Land 1907, the Geneva Conventions 1949, the two Additional Protocols to the Geneva Conventions 1977 etc. – 'which seek, to limit the effects of armed conflict and protect those not taking part or no longer participate in the hostilities.' Effective enforcement of the rules established in these instruments rests wholly within the domestic system of States. Enforcement therefore, depended upon the 'will' and 'ability' of each State to accept the civilised merits of these rules and incorporates them in their national laws. Particularly evident is the responsibility on States to domesticate only part of the range of the rules established in the instruments ratified at the international level. For example, the Geneva Convention Act (1960) of Nigeria offered Nigerian courts the jurisdiction to prosecute only the 'serious violations' provisions of the Geneva Conventions of 1949 – including articles 50, 51, 130 and 147 of the four Geneva Conventions respectively. This limited incorporation omits all other rules specified in the Geneva Conventions 1949. Specifically omitted are the rules recognised in Article 3 Common to the Geneva Conventions: the only provisions of the Geneva Convections that apply to our study - armed conflicts not of international character. The significance of the omission of Common Article 3 from the scheme of domestic incorporation is immediately obvious in relation to the incidence

[1158]U.S. Plans to Put Advisers on Front Lines of Nigeria's War on Boko Haram,' available at: https://www.nytimes.com/2016/02/26/world/africa/us-plans-to-help-nigeria-in-war-on-boko-haram-terrorists.html (Accessed October 2020)

of sexual violence against women and girls in the Boko Haram armed conflict. But this limited domestication is exactly what the Geneva Conventions themselves demanded.[1159]

Several violent acts against women were compounded by the impetus towards infringements as was encouraged by the lack of standardised international enforcement mechanisms in the international instruments of the past. As discussed in chapter 2, notable among these acts were, that women were indiscriminately abused in their thousands in Rwanda and elsewhere. However, with strong resolve from the international community, aided by the unrelenting encouragement of committed scholars, foundations of hope have been laid in the plains of the international criminal court for the effective enforcement of international humanitarian law where a State fails to enforce them or are unable to do so. Most importantly, in this light,- is the prosecution and conviction of *Thomas Lubanga* by the ICC for committing atrocities of sexual violence amongst others in the context of the armed conflict in the Democratic Republic of Congo. This has built hope and confidence in the women and girls abused in the Boko Haram armed conflict, - that those guilty of atrocities may, eventually, face the law.

Indeed, any further unnecessary delay in the opening of full investigations in Nigeria should be examined against its possible infringement of victim's rights to access justice and reparations as stipulated in Article 21 (3) of the Rome Statute. In addition, delays in opening full investigation tent the Court's credibility in Nigeria and weaken – year on year – the Court's pressure on Nigerian government to carry out relevant and genuine domestic trials.

6.3 Reflections

From the beginning, we have argued that Boko Haram is a Nigerian problem. The insurgency emerged out of a weak state policy, especially in the northeast that is rooted in years of

[1159]For example, Article 49 of the first GC stipulates that 'the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the serious violations of the present Convention defined in the following Article.' See similar rules in Articles 50, 129 and 146 respectively of the 2nd, 3rd and 4th Geneva Conventions

socioeconomic frustrations and discontent. The Nigerian authorities failed to take this threat seriously, and the military's brutal force strategy only exacerbated the problem. While Boko Haram may remain a Nigerian problem, understanding the dynamics of the insurgency can help inform policy makers on how to respond to the growing threat of radical ideology. This does not mean, however, that Boko Haram is not part of a global threat, as it remains largely rooted in the Lake Chad region of northeast Nigeria. However, Boko Haram is unlikely to recruit foreign fighters because of language and geographical barriers that will inevitably deter external actors. Its agenda is still very much unclear, and while it was briefly in control of significant part of Nigeria's territory, before settling in the Lake Chad region, it appears more culturally and locally driven, making it a poor ally for ISIS and Al Qaeda and any other similar radical organisations.

Boko Haram will not disappear in the near future. Even if defeated, the roots of such radicalization will continue to flourish, feeding off the frustrations of a population that feels ignored or neglected by its government. Addressing issues such as inequality and economic opportunity will help deter radicals from becoming insurgents by offering them viable alternatives. A focus on displacing the supply chains by taking drastic measures on weapons smuggling and controlling borders can provide ongoing oversight and controls over regions identified as high risk. Investment in key infrastructure such as effective training of security officers and judicial officers in the field of IHL will significantly assist in controlling the threat of an insurgency and obtaining justice for victims by enforcing the law whenever it is violated. There will always be radicals ready to pick up arms, especially in a country as diverse, divided and complex as Nigeria. It is important therefore to remain attentive to these dynamics and for the government to react promptly to avoid such movements from gaining momentum.

Finally, the law of IHL compels States and non-state parties to do their utmost to protect and preserve the life and property of civilians, while at the same time allowing parties to a conflict to commit acts of violence within certain limitations. However, when those limitations are exceeded, and when perpetrators of war crimes are not brought to face the law, there is a natural instinct to dismiss IHL as lacking any real normative force.[1160] This is understandable, but it fails to comprehend the complexities of IHL, and, indeed, international law by extension. As Falk has observed, there is an

> "ironic tendency for individuals to expect law in international issues to do more for the order and welfare of the community than it does in domestic issues ... when these extravagant expectations (of international law) are disappointed the contributions actually made by law to world order are extravagantly neglected."[1161]

Because we expect so much of IHL – that it never breached – when it is broken, we might be inclined to think the whole structure is broken.

However, such an approach fails to acknowledge that the law has made life for those individuals trapped in armed conflicts demonstrably better than if the law had never existed. Such dismissal of IHL would diminish the substantial progress made by States and organisations alike, by the ICRC, by the United Nations, the International Court of Justice, the International Criminal Court, and the hybrid criminal tribunals in reminding every person that the use of force is prohibited; that even in conflict situations, there are laws that must be complied with, and when those laws are violated, consequences will follow, and such will be enforced either by the State or the international community.

[1160]Krieger Heike, *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge University Press, 2015)
[1161]Richard Falk, *The Vietnam War and International Law*, 4 vols (Princeton University Press, 1968-76) 127

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Annex

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